Nos 425, 463 and 464.

Reply Brf. of Harrison, Guthrie & Prussing for P. E.

ILLINOIS INHERITANCE TAX CASES.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1897.

Filed Jan. 26, 1898.

JOSEPHINE C. DRAKE *et al.*, Executors, &c.,
Plaintiffs in Error,
vs.
DANIEL H. KOCHERSPERGER, County Treasurer, &c., of Cook County, Illinois.
No. 425.

ELIZABETH EMERSON SAWYER *et al.*, Executors, &c.,
Plaintiffs in Error,
vs.
THE SAME.
No 463.

JESSIE NORTON TORRENCE MAGOUN,
Appellant,
vs.
ILLINOIS TRUST AND SAVINGS BANK, as Executor, &c., of JOSEPH T. TORRENCE, deceased, and DANIEL H. KOCHERSPERGER, County Treasurer, &c.
No. 464.

BRIEF OF REPLY TO ARGUMENT SUBMITTED IN SUPPORT OF ILLINOIS INHERITANCE TAX LAW OF 1895.

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Replying to points submitted in the brief of defendant and appellee, it may be of aid to show :

1. That the interpretation of the act insisted upon in the opposing brief is not supported by its language or by precedent.

2. That the decisions of this court cited in the opposing brief do not sustain the propositions there submitted.

It is also deemed advisable to present at greater length than seemed necessary in preparing our principal brief the proposition that inheritance and testamentary disposition are fundamental rights which the states are compelled to recognize by the constitutional guaranty of individual property. To this end, some authorities and conclusions sustaining the following minor propositions are respectfully submitted:

3. That the rights of inheritance and testamentary disposition are not of statutory origin.

4. That frequent sanction of these rights by legislative enactment is consistent with the claim that they are natural or fundamental rights.

5. That legislative power to sanction one of these rights at the expense of the other is consistent with the claim that they are both constitutional rights.

6. That as between the state and an individual the only limitations upon these fundamental rights are governmental support and public necessity.

7. That writers who advocate the restriction of inheritance and testamentary disposition in favor of the state are not authorities in this Court.

I.

THE INTERPRETATION OF THE ACT INSISTED UPON IN THE OPPOSING BRIEF IS NOT SUPPORTED BY ITS LANGUAGE OR BY PRECEDENT.

The contention that the rate of the tax in the third class does not depend "on the estate of the person

dying possessed thereof," but on the amount received by each successor or legatee, is directly contrary to the opinion of the Supreme Court of Illinois in the *Drake* case.

It is important to observe that the language employed in respect of the first and second classes is essentially different both in form and substance from that employed in respect of the third class. In the former case the tax is imposed upon the amount received by the successor, in the latter case upon the aggregate succession to all in the class.

Thus, in the first class, "the rate of tax shall be one dollar on every hundred dollars of the clear market value of such property *received* by each person," and at the same rate for less amounts, "provided that any estate which may be valued at a less sum than twenty thousand dollars shall not be subject to any such duty or taxes, and the tax is to be levied in above cases only upon the excess of twenty thousand dollars *received* by each person." In the second class, the tax is imposed upon "the clear market value of such property received by each person on the excess of two thousand dollars so received by each person." In the third class, the tax is imposed "on all estates of ten thousand dollars and less," * * "provided, that an estate in the above case which may be valued at a less sum than five hundred dollars shall not be subject to any duty or tax."

In substance, the contention of our opponents is that for the word "estate" should be substituted the words "legacy, devise or inheritance." To quote the language of their brief: "By substituting its equivalent for the word 'estate' in such classification, all ambiguity disappears, and the intent of the legislature is clear."

This construction, it is stated, has been adopted where similar language has been employed in the tax laws of other states, and reference is made to New York and California.

An examination of the statutes of New York discloses that the language of the inheritance tax law in that state is entirely dissimilar from the language under consideration. The language of the New York law, as originally enacted in 1885,[1] compelled the construction that the exemption depended upon the amount passing to each successor and not the estate of the decedent. Said the Court of Appeals, by DANFORTH, J., in *Matter of Howe*, 112 N. Y., 100, 103 :

> "There are many other provisions of the act requiring the same construction, all tending to show that in the matter of taxation it is simply the 'estate' or share of the beneficiary acquired through the will or the statute of distributions, which is to be valued and the duty estimated according to its value."

The legislature, being advised of this construction, considered that a mistake had been made in expressing its intention, and thereupon so amended the act as to make it perfectly clear that the exemption was not to be based and allowed upon the share of each successor, but was to be based and allowed upon the estate of the decedent, irrespective of the number of successors or the amount of each succession.[2] This is very clearly shown in *Matter of Hoffman*, 143 N. Y., 327, 330, 331, where the Court of Appeals, by FINCH, J., said of this amendment :

> "It was thus possible for a testator to avert the tax by reducing intended legacies of ten thousand dollars to lineals

[1] Chap. 483, Laws of 1885, p. 820.
Chap. 399, Laws of 1893, p. 814.

> to a sum slightly below that amount. * * The question first presented on this appeal, relating to a life estate bequeathed to the mother of the testatrix, and valued at less than ten thousand dollars must be decided, as it always has been in similar cases hitherto, in favor of the legatee, unless in that respect the law of 1892 has changed the necessary interpretation. But I think it has, and that such result was directly and consciously intended by the legislature."

And upon the question of exemption in the New York Act, which corresponds to the third class in the Illinois Act, the following statement of Dos Passos, Inheritance Tax Law, Second Edition, p. 139, may be quoted:

> "So it has been held under the $500 clause of the New York act of 1892 that in every case where property, real and personal, of the value of $500 or more, passes to persons or corporations (collaterals) not exempt from taxation, the liability to tax at the rate of 5 per cent. exists, and the liability is not affected by the size of the individual shares. The property exempted under this clause is not the property passing to the legatee, which must be less than $500 in order to entitle the same to exemption, but the amount of all property passing to legatees of the unexempted class, which must be less than $500."

In California the language of the statute[1] was substantially as set out in the opposing brief, from which it was evident that the intention of the legislature was to grant the exemption with reference to the estate passing to the successor, and not to the estate of the decedent. The exemption in California cannot exceed $500 to each successor; but in Illinois the minimum is $20,000 plus the value of estates for life or for years.

Counsel argue in their opposing brief that "to introduce the two systems of classification" would result in absurdity; and a supposititious case is put of an estate of a million dollars, passing to children, collaterals and strangers in the following proportions, viz.:

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[1]Chap. 168, Stats. of 1893, p. 193.

$750,000 to children ; $200,000 to nephews and nieces, and $50,000 to strangers to the blood. There is neither difficulty nor absurdity under the two systems of classification. The tax would be levied as follows :

(1.) The portion of the estate ($750,000) passing to the children would be taxed at the rate of one per cent. after deducting the exemption of $20,000 to each child and the value of all estates for life or for years.

(2.) The portion of the estate ($200,000) passing to collaterals would be taxed at the rate of two per cent. after deducting the exemption of $2,000 to each successor.

(3.) The portion of the estate passing to strangers would be taxed at the rate of five per cent.

It is submitted that the only proper and reasonable interpretation of the language of the act is that the legislature intended to create, as the Supreme Court of Illinois has held, "six classes of property" passing to successors : the first class being property passing to near relations ; the second class, property passing to near collaterals ; and the remaining four classes, property passing to distant relations and strangers depending on "the estate of one dying possessed thereof ;" and that the tax in the first and second classes is to be calculated upon the amount actually received over the exemption, while the tax in the third class is to be calculated upon the estate actually passing, irrespective of the numbers of successors in that class. The reason for the difference is, that in the first two classes the rate is uniform after deducting exemptions, while in the other classes the rate is progressive.

II.

THE DECISIONS OF THIS COURT CITED IN THE OPPOSING BRIEF DO NOT SUSTAIN THE PROPOSITIONS THERE SUBMITTED.

In *Mager* v. *Grima*, 8 How., 490, this Court held that the privilege of inheriting property by an alien was subject to a special tax imposed by the State of Louisiana. In the case at bar we do not contend that the State of Illinois has no power to impose a special tax upon the privilege of inheritance as enjoyed by an alien or to deny the privilege to aliens. Our contention is that the taxation of inheritances must operate uniformly upon all persons having equal rights to inherit.

United States v. *Perkins*, 163 U. S., 625, is cited by counsel. This Court held in that case that property bequeathed to the United States was subject to an inheritance tax under the laws of the State of New York; that the tax was upon the right to transmit, not upon the property transmitted, and therefore not open to objection as an attempt to tax the property of the United States. In the case at bar we do not contend that the State of Illinois has no power to tax the right to transmit or to succeed to property. Our contention is that this power, when exercised, must operate uniformly upon all persons whose right it is to exercise the testamentary power or to succeed to a decedent's property.

Missouri v. *Lewis*, 101 U. S., 22, is also cited by counsel. An examination, even the most cursory, of the features of that case and the provisions of the act there under consideration, will show that the decision has no application to the case at bar. If it is cited to sustain the proposition that, in respect of litigation, arbitrary conditions may be imposed upon persons or corporations classified according to different rules, then it

should be a sufficient answer to refer to *Gulf, Colorado & Sante Fé. R'y* v. *Ellis*, 165 U. S., 150, decided at the last term.

The Delaware Railroad Tax Case, 18 Wall, 206; *California* v. *Central Pacific Railroad Co.*, 127 U. S., 1; *Home Ins. Co.* v. *New York*, 134 U. S., 594, and *Monroe County Savings Bank v. City of Rochester*, 37 N. Y., 365, are cited by counsel. All these cases and many others which could be cited, including *Maine* v. *Grand Trunk R'y Co.*, 142 U. S., 217, involved the validity of a corporate franchise tax. In them, no other point or question was discussed by counsel or referred to by the Court. The classification of property or of rights to acquire property, for the purpose of imposing different tax rates according to the value thereof, did not arise and was not considered.

The opinions of this Court in these franchise cases pointed out that the principles which govern ordinary taxation of property or rights do not apply to taxes upon corporate franchises or special privileges; that such a franchise tax might be arbitrarily laid, no matter how much hardship or oppression was created by the amount exacted, and that there was no limitation but the discretion of the taxing power. There is, therefore, a broad and fundamental difference between a franchise tax and a tax upon property and property rights or other inherent privileges or rights which cannot be abrogated at the will of the legislature. The difference is radical and is founded in the essential nature of the thing taxed.

The power of the legislature as to corporate franchises is entirely different from the power which exists in respect of individuals. A state may deny existence to corporations; it may exclude corporations of other states; but it cannot exclude individuals of other states. A state may

say that foreign corporations shall not own any real estate or but a limited amount, and allow domestic corporations to own any amount; yet the Illinois legislature could not say that an individual resident of New York should not own real property in Illinois or only to a limited amount. A state may limit the property or acquisitions of corporations, but it can not limit the property or acquisitions of individuals. A state having this absolute power over a corporation to deny it the right to transact business within its borders may impose such conditions as it sees fit in bestowing or withholding this privilege; but in respect of individuals, the state can not do so, whether those individuals be residents or non-residents of the state, provided they are citizens of the United States or aliens protected by treaties. Running through all the decisions of this Court in tax cases of late years, it will be found taken as now established that there is a fundamental difference between property taxes and taxes imposed upon corporations by way of franchise taxes. In Illinois, however, even corporate franchise taxes must, under the Constitution of that state, be imposed by a law "uniform as to the class upon which it operates."

It is true that the franchise tax is properly and technically an excise tax, but it does not follow that the same rules apply to other excise taxes or duties. For example, a legislature may properly impose a tax upon the transfer of real estate, usually called a stamp duty, but essentially an excise tax, but it cannot withhold from the owner of real property the right or power to convey it. A legislature may impose a tax upon all checks, as the Federal Government did for many years, but it could never have been conceived that any legislature or that Congress had the power to deny to the people the right

to pay their debts by means of checks. A legislature may impose a tax upon the sale of any kind of personal property or upon the sale of stocks or grain or anything else, but its right to tax in these cases is not based in any sense upon the theory that it has the right to deny the right of sale, which is a part of property itself. A legislature may impose a stamp tax upon the publication of newspapers or magazines or books, but its right does not originate in any sense in a power to prevent publication. It is consequently entirely erroneous to assume that because conditions can be arbitrarily placed upon the exercise of the corporate franchise created and granted by the legislature, this same principle applies and the same arbitrary power exists in other forms of taxation.

In the case of corporations, and particularly quasi-public corporations, a state may well claim the power to prescribe a reasonable limit to the growth of the value of a special privilege which it grants for a public purpose, because the public purpose upon which alone it can be justified may require that it shall not exceed a certain value; but under the Constitution the extent of the acquisition of property by individuals is illimitable, because it finds its justification not in a public purpose but in common right.

The large number of decisions in the state courts which are referred to by counsel may all be distinguished from the case at bar upon grounds similar to those which have been indicated as applying to the decisions of this court.

We confidently assert that, under our system of constitutional government, no legislature has the arbitrary and despotic power to deny all right of inheritance or testamentary disposition. Nor have any of the cases

cited in the opposing brief held that there was any such despotic power, although expressions to that effect, *obiter* and speculative, are to be found. No state ever attempted to exercise such a power. These expressions depend upon an erroneous statement of Blackstone. The maxim in regard to such *obiter* expressions need hardly be recalled, for in the language of Chief Justice MARSHALL, in *Cohens* v. *Virginia*, 6 Wheat. 264, 399, "The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." See also *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 574.

III.

THE RIGHTS OF INHERITANCE AND TESTAMENTARY DISPOSITION ARE NOT OF STATUTORY ORIGIN.

A.

As to the right of inheritance.

By the facts of legal history the right to acquire and transmit property by inheritance is shown to have existed from the beginning of law to the present time as an essential attribute of the right of property.

The origin of property is the origin of law;[1] the origin of both property and law is the origin of

[1] It will hardly be contended that the right of property originated in statute law; yet—"That is property which is recognized as such by the law, and nothing else is or can be. 'Property and law are born and must die together. Before the laws there was no property; take away the laws, all property ceases.'" Cooley, Prin. of Const. Law, 2 ed., p. 327; Bentham, Theory of Legislation, 1896, p. 113. "L'esprit des lois—c'est la propriété." Linguet, quoted in Palgrave's Dict. Pol. Econ., vol. 1, p. 744.

civilized society ;[1] the transition of society from turbulence to order supplies the reason of the law creating property ;[2] and in the development of property rights under the law, for the same reason, the right of inheritance is included.[3]

The natural right of children to inherit the property of their parents was recognized by law in the earliest period of society of which we have any record.[4] Children were regarded as having an inchoate right in their parent's property during life, not as against the parent necessarily but as against all others—a *jus ad rem* convertible by law at the parent's death into a *jus in re*.[5] This principle is asserted by all writers of legal history to have prevailed from the beginning ;[6] and it was accorded a prominent place in the first compilations of existing law.[7] Nowhere do we find it authoritatively denied.

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[1] Bigelow, Wills, 1897, advance sheets in XI Harv. L. Rev. p. 74, n. 1. "Till such right has been established there can be neither industry nor civilization." McCulloch, Succession to Prop., 1848, p. 2.

[2] "With the progress of law from rudeness to refinement," property rights "kept increasing in consideration and vigor." 2 Kent, Com., 14 ed., p. 325.

[3] Austin, in his definition of property, has taken care to include inheritance. Austin, Jurisp., Campbell's ed., vol. 2, sec. 1103. Bracton treats inheritance as one of the methods of acquiring the dominion of things. Bracton, De Legibus Angliæ, Transl. 1878, bk. 2, ch. 29, sec. 1.

[4] U. S. v. Perkins, 163 U. S., 625, 628. It has been well said that "the time when no such law existed is in strictest sense a prehistoric time." 2 Pollock and Maitland, Hist. of Eng. Law, 1895, p. 248.

[5] See Pakenham, Descent, 1766, p. 63 ; 2 Pollock and Maitland, Hist. of Eng. Law, 1895, p. 247.

[6] "It is abundantly certain that in remote ages property everywhere descended on the death of the possessor, as a matter of course, to his children or nearest of kin. It is consonant to the sense of justice that it should be so." McCulloch, Succession to Prop., 1848, p. 3. "The preference of descendants before all other kinsfolk we may call natural, that is to say, we shall find it in every system that is comparable with our own." 2 Pollock and Maitland, Hist. of Eng. Law, 1895, p. 258.

[7] "The Law of Moses gave the eldest son a double portion, and excluded the daughters entirely from the inheritance, so long as there were sons, and descendants of sons ; and when the inheritance went to the daughters in equal portions, in default of sons, they were obliged to marry in the family of their

It is true that Sir William Blackstone says: "the law of nature suggests, that, on the death of the possessor, the estate should again become common, and be open to the next occupant," but he adds: "for the sake of civil peace, by the positive law of society," it is otherwise ordered.[1] It is, therefore, apparent that Blackstone's conception of the law of nature supposes a time when no positive law existed—a period before society, when man was in a state of nature.[2]

Chancellor Kent's statement of the law of nature in respect of inheritance is practical, and its truth is self-evident. He regards this natural right as the offspring of the social state, not the incident of a state of nature; and its recognition by sovereignty as a legal right he regards as the inevitable result of its existence as a natural right. For he says:[3]

> "The right to transmit property by descent, to one's own offspring, is dictated by the voice of nature. The universality of the sense of a rule or obligation, is pretty good evidence

father's tribe, in order to keep the inheritance within it." 4 Kent, Com., 14 ed., p. 376. "In the Gentoo Code, all the sons were admitted, with an extra portion to the eldest, under certain circumstances, and no attention was paid to the daughters, according to the usual and barbarous policy of the Asiatics." *Ibid.* "Under early Greek institutions, movables were divided among the children, and if none, then among the nearest relations on the father's side." *Ibid.*, p. 377, note (c). "The law of succession at Athens resembled, in some respects, that of the Jews; but the male issue took equally, and were preferred to females; and if there were no sons, then the estate went to the husbands of the daughters." *Ibid.*, p. 377. "The Law of the Twelve Tables admitted equally male and female children to the succession" *Ibid.* A rule could hardly have become so universal among both civilized and barbarous peoples unless dictated by the instinct of justice. "Where the practice is universal it is reasonable to think the cause natural." Locke, Gov., ch. 9, sec. 88,

[1] 2 Blackstone, Com., p. 13.

[2] "This is, of course, mere idle speculation; but it was the current view when Blackstone's treatise was published." Markby, Elements of Law, 4 ed., sec. 791. "If he and they mean, that the actual regulations of leading States, as primogeniture among the English, and the exclusion of emancipated sons and married daughters among the Romans, are not dictated by the law of nature, no one will make issue with them." P. Bliss in 3 So. L. Rev., p. 444.

[3] 2 Kent, Com., 14 ed., p. 326.

that it has its foundation in natural law. It is in accordance with the sympathies and reason of all mankind, that the children of the owner of property, which he acquired and improved by his skill and industry, and by their association and labor, should have a better title to it at his death than the passing stranger. It is a continuation of the former occupancy in the members of the same family. This better title of the children has been recognized in every age and nation, and it is founded in the natural affections, which are the growth of the domestic ties, and the order of Providence."

And again :[1]

"It encourages paternal improvements, cherishes filial loyalty, cements domestic society; and nature and policy have equally concurred to introduce and maintain this primary rule of inheritance, in the laws and usages of all civilized nations."[2]

The ancient Germans recognized and enforced as a natural right the inheritance of children ; and, in case of the failure of children, the right was extended to others of the blood of the decedent.[3] In the laws of the Anglo-Saxons prior to the Conquest the same rules were in force.[4]

In the Roman law, the recognition of this natural right of children to inherit produced the doctrine of family ownership of property and of the posthumous

[1] 4 Kent, Com., 14 ed., p. 376.

[2] To similar effect, see also, Christian's notes to 2 Blackstone, Com., p. 11, note 3.

[3] Among the ancient Germans, according to Dr. Francis S. Sullivan, "upon death the right went according to the plain dictates of nature." Lectures on Const. and Laws of England, 1805, Vol. 1, p. 108. Says the same author, quoting from Tacitus (de M. G. chs. 5 and 7): "To every man his own children were heirs and successors. For want of them, his nearest of kin, his own brothers, next his father's brothers, or his mother's." *Ibid.*, 108. "The property belonged to the family, as a sort of corporation ; while the family continued, the community had nothing in the property." Bigelow, Wills, 1897, advance sheets in XI Harv. L. Rev., p. 75.

[4] The great legal antiquarian, John Selden, in 1683, says that by the laws of the Saxons an intestate's goods were to be "divided among his wife and children and the next of kin, according as to every one of them of right belongs, that is, according to the nearness of kindred, if no children or nephews from them be;

existence of decedents in the persons of their successors.[1]

The recognition of rights of inheritance in land was more slow than that respecting movables; but this was so because individual property in land was not so soon a social necessity. Even in respect of land, the right of inheritance kept pace with the right of property. Exactly to the extent that individual property therein became recognized as a right, inheritance followed. No historical authority maintaining a contrary view has anywhere been found.

The evolution of property in land may be traced with great historical precision. Land was first held during the pleasure of the sovereign, afterwards for life, then again it descended to children and lineals, and finally in modern times the right of property in land has become as absolute as property in movables or personalty.[2]

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for it must, I suppose, be understood, that the succession was such, that the children excluded all their kindred." Selden, Tracts, 1683, tr. 4, pt. 2, ch. 1, p. 15. To the same effect is chapter 71 of the Laws of Canute, which say that in case of intestacy: "Let the property be distributed very justly to the wife and children and relations, to every one according to the degree that belongs to him." Stubbs, Select Charters, 1884, p. 74. In his charter to the City of London, William the Conquerer says: "I will that you enjoy all the law, which you did in the days of Edward, King, namely, the Confessor; and I will that each child shall be his father's inheritor after his days." Pakenham, Descent, 1766, p. 8; Stubbs, Select Charters, 1884, p. 83. In the most ancient book, at Westminster the following appears: "To every man, his children are the heirs and successors, and there be no testament. If there are no children, then his brothers, uncles of the father's side and uncles on the mother's side inherit." Pakenham, *Ibid.*, p. 8.

[1]Maine, Ancient Law, 1864, pp. 183, 184; Holland, Elements of Jurisp., 8 Ed., 1896, 143. "The Roman heir took immediately and as of right under a title which was inchoate in the life of his ancestor. The XII. tables speak of *sui heredes*, that is, heirs of themselves or their own property." 4 Kent, Com., 14 ed., p. 441, note.

[2]Sullivan, Lectures on Const. & Laws of England, 1805, vol. 1, pp. 103, 169; Kent, Com. 14 ed. vol. 2, p. 326, *et seq.*; Bisset, Estates for Life, p. 1. The history of property in lands in the time of the Saxons is perspicuously stated by Sir John Dalrymple in his celebrated work on Feudal Property, 4 ed., 1758, ch. 5, sec. 1, p. 198, *et seq.* He says, p. 201, that the inheritance in land was "equally divided among all the sons."

The extension of the right of inheritance in land to collateral upon failure of lineal heirs was a natural consequence of the recognition of this right in lineals. It is plain that the principle of individual succession which gives to lineals a right of acquisition superior to collaterals or strangers, gives to collaterals a right of acquisition superior to individual strangers.[1] As the right of lineal inheritance was recognized and sanctioned by positive law long prior to the time when statutes became a source of law in the sense of that to which rights owe their existence, in precisely the same manner collateral inheritance was recognized as a natural right, and, by the sanction of positive law, became a legal right. Lord Kames in 1749 said that collateral succession is universal, "not by statute, but by custom."[2] Sir John Dalrymple in 1758 said that it crept into the law of Great Britain as well as into that of other European nations, "by practice, without a public ordinance."[3] And the opinion is universally accepted that "the rules which govern the descent of real property are the rules of the common law."[4]

B.

As to the right of testamentary disposition.

Legal history records that testamentary disposition

[1]It is not here contended that the principle of inheritance gives to collaterals a right to acquire by succession superior to that of the whole community.

[2]Kames, Succession or Descent, p. 159.

[3]Dalrymple, Feudal Property, 4 ed., ch. 5, sec. 2, p. 217.

[4]Raleigh, Law of Property, 1890, p. 119, *et seq.*, and authorities cited.

is a natural right, coeval with the right of alienation.[1] In Athens previous to the time of Solon, so far as known, "the natural heirs" could not be disinherited. The Attic laws of Solon sanctioned the testamentary right only in those who had no children.[2] In Rome, the XII Tables, a codification of existing laws, "conceded in terms the utmost liberty of testation."[3] But the Roman testament was, for a long period, limited in its operation by the doctrine of family ownership under the institution of *patria potestas*.[4] In the later Roman Empire, when family ownership had gradually given way to individual ownership, the testamentary right was again limited in favor of the natural heirs.[5]

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[1] "The power of alienation of property is a necessary incident to the right of property." 2 Kent, Com., 14 ed., p. 326. Grotius considers disposition by will to be one of the natural rights of alienation. De Jure Belli, bk. 2, ch. 6, sec. 14. In the Bible we read that Abraham, before the birth of Isaac, contemplated leaving his possessions to his servant (Gen., c. 15, v. 3, 4); that Sarah protested against the son of Hagar being made heir with Isaac (Gen., c. 21, v. 10); that Abraham, in contemplation of death, gave gifts to the sons of his concubines (Gen., c. 25, v. 6); that Jacob gave to Joseph a double portion (Gen., c. 48, v. 22); and that the Law of Moses prohibited the disherison of the son of a hated wife in favor of the son of a beloved wife (Deut., c. 21, v. 16).

[2] McCulloch, Succession to Prop., 1848, p. 3; Maine, Ancient Law 1864, p. 191; 4 Kent, Com., 14 ed., p. 502.

[3] Maine, Ancient Law, 1864, p. 210; I Jarman, Wills, 5 Am. ed., p. 146, note.

[4] "It is certain," says Maine, "that, in the old Roman Law of Inheritance, the notion of a will or testament is inextricably mixed up, I might almost say confounded, with the theory of a man's posthumous existence in the person of his heir. * * It was at first not a mode of distributing a dead man's goods, but one among several ways of transferring the representation of the household to a new chief." Maine, Ancient Law, pp. 183, 188. And McCulloch says: "In Rome, where the paternal authority was carried to an extreme, the right of the children to succeed to the property of their father was, for a lengthened period, indefeasible, except by a will made in an assembly of the people." McCulloch, Succession to Prop., 1848, p. 3. "The gradual growth of the power to make a will, from the days when it could only be made in the 'comitia calata,' or in the face of the people drawn up in battle array, 'in procinctu,' through the twelve tables, and the praetorian relaxations, down to the wide liberty enjoyed under the later Empire, is one of the most interesting topics of the history of Roman law." Holland, Elements of Jurisp., 8 ed., p. 143.

[5] This was accomplished by the *lex Falcidia*, which was confirmed by the *corpus juris* of Justinian. See an article by Dr. Robert C. Fergus, entitled The Influence of the Eighteenth Novel of Justinian, in VII Yale L. J., 1897, pp. 26, 67, 68, which contains also many valuable quotations showing that in nearly all the continental countries the recognition of the children's right of inheritance resulted in legal restrictions upon disherison.

By the common law of England there can be no doubt that the first principles established to secure the enjoyment of ownership in personal property sanctioned the testamentary right. This is stated without qualification by the best authorities.[1] Testamentary right in land, although not so soon sanctioned as that in personalty, is yet coincident with the sanction of that individual property in land which includes the power of alienation.[2] That the right to devise lands was freely exercised in the time of the Saxons "is a matter of which there is no question" in the pages of legal history.[3]

From the foregoing, it appears that the first exercise of the testamentary power was a limited one; and that its limitations are traceable to two causes only: first, the right of inheritance long before established as a law of property,[4] and secondly, the limited extent to which property in lands was in the earliest period of law recognized and sanctioned.

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[1] Coke, Litt., 111 b., note 138 by Hargrave; 2 Blackstone, Com., 491; 4 Kent, Com., 14 ed., 501–505; Robertson, Personal Succession, ch. 1, sec. 1, p. 5; Williams, Executors, 6 Am. ed., bk. 1, pt. 1, ch. 1. The Laws of Canute, A. D. 1016, 1035, made provision for the disposition of goods "if anyone depart this life intestate." Stubbs, Select Charters, 1884, p. 74; Selden, Tracts, 1683, tr. 3, ch. 5, p. 5; 2 Pollock and Maitland, Hist. of Eng. Law, 1895, p. 259, note 2.

[2] 2 Kent, Com., 14 ed., 326, 327. Mc Culloch, Succession to Prop., 1848, p. 4; Kames, Succession or Descent, 1749, pp. 127, 128, note.

[3] Swinburne, Descents, 1825, p. 94. Powell, Devises, p. 1; Bigelow, Wills, 1897, advance sheets in XI Harv. L. Rev., p. 75, n. 1. For instances of Saxon devises, see Selden, Tracts, 1683, tr. 3, ch. 5, p. 5, *et seq.* "It seems to have been rather adopted from the remnant of the Roman laws and customs they found there, than brought from their own country." Coke, Litt., III b., note 138 by Hargrave. Bigelow, *Ibid.* pp. 74, 75.

Before the progress of social civilization had reached that point where testamentary disposition became a right of property, inheritance had long been recognized as such. "Inheritance is a more ancient institution than Testamentary Succession." Maine, Ancient Law, 189, 190. "The principle that a man may voluntarily select the person on whom his property is to devolve after his death is of later origin than the principle of intestate succession. Such a selection had at first to be ratified by legislative authority, in order to oust the rights of relatives." Holland, Elements Jurisp., 8 ed., 1896, p. 143.

The only limitation of the testamentary right in personal property in the time of the Saxons and until the reign of Henry II, was the then superior right of inheritance—the natural rights of wife and children. This proposition cannot be made plainer than by the following language of Blackstone, adopted from Glanvil, who wrote of the common law as it stood in the time of Henry II.:

> "In the reign of Henry the second, a man's goods were to be divided into three equal parts : of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal ; or, if he died without a wife, he might then dispose of one moiety, and the other went to his children ; * * if he died without either wife or issue, the whole was at his own disposal."

And Blackstone adds :

> "This continued to be the law of the land at the time of *magna charta.* * * In the reign of King Edward the third, this right of the wife and children was still held to be the universal or common law ; * * and Sir Henry Finch lays it down expressly, in the reign of Charles the first, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now, by will, bequeath the whole of his goods and chattels ; though we cannot trace out when first this alteration began."[1]

This has been fully accepted as being a correct statement of the facts by a number of eminent authorities, a few of which are cited below;[2] and has been recently quoted with approval by this Court.[3]

Although the modern testamentary laws do not as a rule compel provision for children, yet this is not because they have no natural right to inherit as against strangers or the whole community or people

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[1] 2 Blackstone, Com., p. 492.

[2] Fitzherbert, Nat. Brev., 1793, 122; McCulloch, Succession to Prop., 1848, pp. 7, 8; Williams, Executors, pt. 1, bk. 1, ch. 1 ; 1 Jarman, Wills, 5 Am. ed., p. 146, note ; Schouler, Wills, 1887, sec. 14.

[3] U. S. v. Perkins, 163 U. S., 625, 627.

at large represented by the state, but because their right is deemed to be inferior to that of the parent to dispose of his own as he will. The law, relying upon a person's sense of natural justice to provide for those of his own blood in the manner most fitting, sanctions the natural right of testamentary disposition as a consequence of the natural right of free alienation. This is pointed out by Chancellor Kent, as follows :

> "The law of succession has been deemed by many speculative writers, of higher and better obligation, than the fluctuating, and ofttimes unreasonable and unnatural distributions of human will. The general interests of society, in its career of wealth and civilization, seem, however, to require, that every man should have the free enjoyment and disposition of his own property ; for it furnishes one of the strongest motives to industry and economy. The law of our nature, by placing us under the irresistible influence of the domestic affections, has sufficiently guarded against any great abuse of the power of testamentary disposition, by connecting our hopes and wishes with the fortunes of our posterity."[1]

The following language of J. R. McCulloch, in 1848, upon this principle is deserving of careful consideration :

> " It is obvious, indeed, that the practice of lineal succession could not be enforced without, at the same time, prohibiting the alienation of property ; for, if a man may alienate, or dispose of his property during his lifetime, his heirs at law may be as effectually disinherited as if he were permitted to bequeath his property to others to their exclusion. The ability to alienate movable property is, however, indispensable to enable society to make any progress, or even to emerge from barbarism ; and independently of the power to alienate being essential, and of its being alike impossible to prevent its exercise, or to ascertain the motive that may lead to it, the reasonableness and propriety of those who have no near relations, or who may have been deeply indebted to strangers, transferring a part, at least, of their property to their friends and benefactors, must in no long time have become apparent.

[1] 4 Kent, Com., 14 ed., pp. 501, 502.

Hence the principle of allowing property to be disposed of by will or testament was necessarily, though gradually and slowly, introduced." [1]

This principle was very clearly expounded by Lord Kames in 1749 as follows:

"In early times property was not much distinguished from what is now called *usufruct*. No more was conceived in property, but the limited use of the subject. But experience pointed out a more extensive idea of property. Mankind are fond of power, especially over what is their own; and it came to be considered as an unreasonable hardship, after industry bestowed in acquiring and improving a field, that the occupier should not have it in his power to dispose of it at his pleasure. The power of disposal was relished, and became law, because it was every one's interest that it should be law. And when once this power was understood, it came by degrees to be extended the utmost length it was capable of. * * Therefore, when we read of ancient laws among particular nations, introducing the power of making a testament, we must not consider these laws as bestowing peculiar privileges, but only as authorizing a practice which was the consequence of an enlarged idea of property."[2]

The reasons which have been given for the existence of the right of testamentary disposition clearly show it to be a natural right, the security of which is indispensable to liberty, independence and social progress. Following are some opinions of authoritative writers which further explain the views above stated. In McCulloch's Succession to Property, 1848, p. 11, the author says:

"By gratifying that love of power inherent in every man, the privilege of bequeathing acts as an efficient spur to industry; makes immediate become subservient to prospective considerations; and sets, as Blackstone has stated, 'the passions on the side of duty.' All classes feel its powerful influence. The laborer strives to increase his deposits in the savings bank; the farmer and retail dealer become more active and enterprising; and the plans and combinations of the capitalist cease to be circumscribed by the brief duration of

[1] McCulloch, Succession to Property, pp. 4, 5.

[2] Kames, Succession or Descent, pp. 127, 128, note.

human life. The right to name his heir, makes him engage with ardour in undertakings, of which posterity alone can reap the full advantage. He shares by anticipation in the consideration to be enjoyed by his successors; he is elated by their fancied distinction; and for their sakes strives with unabated or increased anxiety to accumulate wealth far beyond the measure of his own wants and desires. The truth of these statements is too obvious to be disputed, and has been admitted by all publicists and inquirers into the history of society."

Eyre Lloyd, in Succession Laws of Christian Countries, p. 28, says, translating the words of the great French writer, Montalembert, written in 1857:

"When the English wished to put the finishing stroke upon the slavery of Ireland, they passed a law in 1701 by which the freehold property of every deceased Papist should be divided equally among his children, unless the eldest became a Protestant, in which case he could become exclusive heir to the property of his father.

"When they came to repent of their long injustice towards their victim, the first act of gradual emancipation was to abrogate this law in 1778, and thus to re-establish for the Irish Papists the dignity and independence of property."

Sir Henry S. Maine, the great English jurist and antiquarian, in Ancient Law, 1864, p. 183, says:

"Testamentary law is the application of a principle which may be explained on a variety of philosophical hypotheses as plausible as they are gratuitous; it is interwoven with every part of modern society, and it is defensible on the broadest grounds of general expediency."

The latest English economic authority, Professor Joseph S. Nicholson, in Principles of Political Economy, 1893, p. 253, says:

"The fundamental economic reason for allowing freedom of bequest as the general principle is found in the stimulus that is given to labour and saving. People will not toil and accumulate wealth for the purpose of enriching the state. The attempt to impose succession duties approaching a hundred per cent would be the greatest possible encouragement to wasteful extravagance."

IV.

FREQUENT SANCTION OF THESE RIGHTS BY LEGISLATIVE ENACTMENT IS CONSISTENT WITH THE CLAIM THAT THEY ARE NATURAL OR FUNDAMENTAL RIGHTS.

It is not sound reasoning to argue that inheritance and testamentary disposition are not fundamental property rights because a great number of public ordinances, in the history of the law, have been enacted to secure their enforcement or to regulate their enjoyment. These have been but the methods which the sovereign power was forced to employ for the sanction of recognized natural rights.[1] Constantly bearing in mind this principle, we are not reduced to the absurd necessity of reflecting upon the hardship of the command "thou shalt not steal" because no act of legislative grace had theretofore permitted the acquisition of property.[2] We are not called upon to question the authority of the divine decree giving the property of Zelophehad, after his death, intestate and without sons, to his daughters because no right of inheritance or testamentary disposition had been created by statute.[3] We need not inquire by what authority historians say that the time when no right of inheritance existed is "in strictest sense a

[1] "Some confusion has arisen from not observing that laws occasionally owe their existence as rules and their validity as laws to one and the same authority." Holland, Elements of Jurisp., 8 ed., 1896, p. 50.

[2] "'Thou shalt not steal' would be nonsense but for the fact of lawful property-relations." Bliss, Sovereignty, 1885, p. 25.

[3] "Then came the daughters of Zelophehad * * 2. And they stood before Moses * * saying, 3. Our father died in the wilderness * * in his own sin, and had no sons. 4. Why should the name of our father be done away from among his family, because he hath no son? Give unto us, therefore, a possession among the brethren of our father. 5. And Moses brought their cause before the Lord. 6. And the Lord spake unto Moses, saying, 7. The daughters of Zelophehad speak right: thou shalt surely give them a possession of an inheritance among their father's brethren; and thou shalt cause the inheritance of their father to pass unto them." Numbers, c. 27.

prehistoric time."[1] We do not ask why it was that the unrestricted power of bequest allowed by the XII Tables was not considered an innovation.[2] We are not surprised that the laws of Canute and Edward the Confessor should have provided for succession to intestate estates without first conferring the right of testamentary disposition.[3] We are not lost in idle speculation upon the forces which moved William the Conqueror to declare in his charter to the City of London that "each child shall be his father's inheritor after his days;"[4] nor do we marvel at the provisions of Magna Charta which secured inviolate the rights of inheritance and testamentary disposition.[5] We are not finally forced to conclude that when our own Constitution said that "the citizens of each State shall be en-

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[1]2 Pollock & Maitland, Hist. of Eng. Law, 1895, p. 248.

[2]Maine, Ancient Law, p. 210. 4 Kent, Com., 14 ed., p. 503. "We read how the kings of Rome, and afterward the prætors, and long before the Twelve Tables, sat in the forum to administer justice; and could it be that their decisions were arbitrary? We must believe that they were based upon well-known rules, although not formally adopted. Nor can we believe that the kings of heroic Greece, sitting in judgment in the midst of their councils, were guided by no well-understood principles. The Themistes were said to be inspired, not only because of the king's priestly office, but because they responded to the divine instincts, and because the rules which guided them came from the gods." Bliss, Sovereignty, p. 24. "Law did not then begin to be when it was put into writing, but when it arose, that is to say, at the same moment with the mind of God." Cicero, 2 De Legib., p. 4; quoted in Holland, Elements of Jurisp., 8 ed., 1896, p. 31.

[3]Selden, Tracts, 1683, tr. 3, ch. 5, p. 5. Stubbs, Select Charters, 1884, p. 74. 2 Pollock & Maitland, Hist. of Eng. Law, p. 259, n. 2.

[4]Pakenham, Descent, 1766, p. 8; Stubbs, Select Charters, 1884, p. 83.

[5]Magna Charta secured the right of inheritance in respect of both real and personal property, and the right of testamentary disposition as to the latter. The necessities of feudal government at this period (A. D. 1215) were essentially inconsistent with free alienation of land, and therefore the right to devise land was not recognized. See Pakenham, Descent, 1766, pp. 20, 79, 80; 2 Pollock & Maitland, Hist. of Eng. Law, p. 354, *et seq*; Care, English Liberties, 6 Ed., 1774, pp. 11, 12, 18. The causes which produced *Magna Charta* were the encroachments by the kings of the Norman line upon English liberties and particularly those relating to property rights. All legal writers and historians assert that the Great Charter of Liberties and subsequent charters in confirmation thereof were Constitutional pledges to secure the principles of existing law. Pakenham, *Ibid*, pp. 2, 7, 19; Care, *Ibid*, p. 6; 2 Blackstone, Law Tracts, 1762, Introd., p. 12; Thomson, History Essay on Magna Charta, 1829, pp. 164, 167.

titled to all the privileges and immunities of citizens of the several States," it meant only to secure to each person a life estate in property holden under the law by him and his heirs forever, and left the right of inheritance and testamentary disposition subject to the will of the legislatures. As Mr. Justice WASHINGTON said in *Corfield* v. *Coryell*, 4 Wash., 371, 380, which is referred to in the *Slaughter-House Cases*, 16 Wall, 36, 75, as the leading case on the subject:

> "The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental;* which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."

It matters not whether these rights be denominated natural or artificial. It is enough that they are fundamental rights of property. As such they are protected by the Constitution. And no definition of a right of inheritance or testamentary disposition, which does not either affirm or deny that it is a fundamental right of property, is entitled to consideration. The law of Moses, the XII Tables, Magna Charta, were equally constitutions with our own, in the sense of securing the natural rights of property or the inalienable rights of the individual. On these our constitutional guaranties are founded; and

in the light of the historical facts which produced them, the development of natural rights of property is traceable through several successive stages. Keeping pace with the needs of advancing civilization, we perceive the transition of property from the character of a limited usufruct to the dignity of an inheritable estate, passing first to the owner's immediate family and later to his collateral blood relations. To meet again the demands of society, the right of alienation appears and begets the right of testamentary disposition.

Certain rights of life, liberty and property were recognized as inalienable in the Declaration of Independence. Surely, the people did not then believe that rights originating in statute, or which could only be traced historically back to some statute, were excluded. They had for centuries enjoyed the right to inherit and to dispose by will. These rights had their foundations in a deep-rooted public sentiment and race instinct. Is it conceivable that they intended to allow their legislatures to escheat or confiscate their property upon the death of an owner? Did they deem it possible that all their property could be reduced to a life estate? They withheld the power of escheat and of corruption of blood from the national government; and they took away from the states the power of attainder. The people then enjoyed rights of property, and these rights, whatever their origin, they intended to preserve. Every step they took evinces their jealousy of state or national legislative power and their determination to establish a government of equal rights as they were then enjoying them.

The fourteenth amendment of the Constitution, like

other constitutional provisions, is designed to establish on a permanent basis and to nationalize certain broad principles generally recognized, which the people believed to exist as inherent and self-evident rights of free men. When these or any other of our constitutional safeguards were adopted, the people certainly did not consider and intend that the construction of the provisions should be governed and limited by the historical sources, or origin, or occasion of the existing rights from which our system of laws is derived. Nor did they contemplate that the scope of the constitutional guaranties should be controlled or narrowed by the manner in which fundamental rights (long recognized as inalienable and inherent in man among a free people) were evolved and established, either by common consent or by statute, as, from time to time in the past, our race emerged from a semi-barbarous condition, where the rights to life, liberty or property were neither recognized nor secured.

Thus, the right to make a will of real estate, or to inherit real or personal property under certain conditions may not have existed in prehistoric times or among barbarian tribes, from whom some of our unwritten law was handed down; but, ever since the establishment of the Colonies and of the United States, the people have considered that power to dispose of their property by will was as much a right as the right to buy and sell property, and not merely a privilege temporarily allowed by the state as a matter of grace. There are innumerable rights which to-day are considered inalienable rights of the individual, but which did not exist in ancient times, and were first established, or are now evidenced, only

by statute. This might be said to be true, not only of the right of individual ownership and disposition of real property, but also as to the liberty of making certain classes of contracts and as to some of our personal rights and relations. Can it be seriously argued that the states could, notwithstanding the provision against legislation depriving a man of life, liberty or property without due process of law, go back to the feudal or barbarian law on the theory that all privileges since granted were merely temporary licenses, granted by the state as a matter of grace, but subject to revocation at its will?

Laying aside the historical facts which show that the conception of property prior to the adoption of the Federal Constitution embraced inheritance and testamentary disposition, we have yet convincing evidence that the constitutional guaranty of individual property was intended to secure these two rights as essential attributes of property. The first Congress, during its first session, had occasion to consider these rights and provide for their enforcement in the organic laws of what was then known as the Northwest Territory. The provision as set out in 1 Statutes at Large, p. 51, is as follows:

> "*Be it ordained by the authority aforesaid*, That the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent in equal parts among them: And where there shall be no children or descendants, then in equal parts to the next of kin, in equal degree; and among collaterals, the children of a deceased brother or sister of the intestate, shall have in equal parts among them their deceased parent's share; and there shall in no case be a distinction between kindred of the whole and half

blood ; saving in all cases to the widow of the intestate, her third part of the real estate for life, and one-third part of the personal estate."

V.

LEGISLATIVE POWER TO SANCTION ONE OF THESE RIGHTS AT THE EXPENSE OF THE OTHER IS CONSISTENT WITH THE CLAIM THAT THEY ARE BOTH CONSTITUTIONAL RIGHTS.

It is submitted that the states are compelled by the constitutional guaranty of individual property to recognize inheritance and testamentary disposition as fundamental rights of property.

These rights are, it is true, logically opposed to each other. One exercised in its fullest perfection excludes the exercise of the other ; and both can be exercised concurrently only by excluding the exercise of each *pro tanto*. But they do not for this reason cease to be fundamental rights of property. The extent of the exercise of both or either of them, and the exclusion of one, or the partial exclusion of both, by reason of the exercise of one or both, is the field of legislative discretion. The legislature may in its discretion ordain that wife and children, and such others as may properly be deemed to have natural rights of inheritance, shall inherit all the property. Thus may the testamentary right be excluded by the right of inheritance. Again, the legislature may in its discretion sanction the right to dispose of that portion which remains after suitable provision

has been made for natural heirs. Thus may the testamentary right be limited by the right of inheritance. Finally, the legislature may in its discretion sanction the testamentary right to dispose freely and entirely of all the property by will. And thus may the right of inheritance be excluded by the testamentary right.

Throughout the pages of legal history, as before shown, the recognition of these two fundamental rights is plain. And when their nature is perceived, it is not surprising that from the beginning of their existence as natural rights a struggle for superior legal sanction has been continually in progress: the natural rights of wife and children to inherit on the one hand, the natural right of a proprietor to unlimited power of disposition on the other hand. The occasional recognition or restriction by law of inheritance in favor of testamentary disposition, or *vice versa*, marks but the ascendancy of one or the other of these natural rights in the eye of the law. With this conflict, the Constitution has nothing to do. Having established the right of property beyond cavil, it has wisely left to the states the power of choosing between these two essential attributes of the right of property.

Therefore, whilst the legislature may exclude the testamentary right altogether, it can only so do by extending the right of inheritance to its furthest limit; and the utmost limit is the blood or natural ties of the decedent. It cannot exclude the natural right of testamentary disposition by according rights of inheritance to persons who have no natural right to inherit; nor can it deny the testamentary right when natural rights of inheritance do not exist. The legislature may exclude altogether the right of inheritance;

but this it may do only by the fullest recognition of the testamentary right. It cannot exclude the natural right of inheritance by according rights of inheritance to persons who have no natural right to inherit; nor can it deny the right of inheritance when the testamentary right has not been exercised.[1]

VI.

AS BETWEEN THE STATE AND AN INDIVIDUAL THE ONLY LIMITATIONS UPON THESE FUNDAMENTAL RIGHTS ARE GOVERNMENTAL SUPPORT AND PUBLIC NECESSITY.

Nowhere in the history of the law do we find an instance of a sovereign right of property opposed to the rights of inheritance and testamentary disposition, except only that which has at all times been necessary for governmental or public purposes. Even during the period of feudal tyranny, sovereign ownership of lands could lay claim to no other basis than that it was necessary for governmental support. The feudal system as introduced or perfected by William the Conqueror limited the right of inheritance and destroyed the rights of alienation and devise in those lands which it

[1] "In the case of intestacy," to quote the language of the latest writer on wills, "the State acts as an intermediary, in behalf of the public welfare. It is obvious that the same was true in feudal England, when the right to make wills, admitted and practised of goods and chattels, was cut off in respect of land. Except as original source of right, with right of escheat on failure of heirs, the State was not deemed owner, resuming its own upon the death of the tenant, and then making a gift of the property to the next taker. It acted then as before, and as at the present time, as an intermediary, to see that the social fabric should not perish. The transfer made was a transfer by rightful authority or power, not the gift of an owner." Bigelow, Wills, 1897, advance sheets in XI Harv. L. Rev., pp. 72, 75.

affected.[1] This it did by taking away the right of individual property in lands and granting them out upon peculiar conditions. The performance of military services, or an agreed or customary equivalent, became an invariable condition of all feudal grants. This was the necessary foundation of feudal government. That it was an innovation or a revolution is admitted by all legal writers.[2]

The decline of the feudal system, through the failure of military government to meet the demands of civilization and social progress, gradually restored the natural right of property in lands which the feudal chiefs had arrogated to themselves; and the restoration of property carried with it the natural rights of inheritance, alienation and testamentary disposition.[3]

Upon the abolition of feudal tenure, government is no longer supported by military services, but by taxation of property.[4] Title to lands derived from the

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[1]Tenure in chivalry and primogeniture were established in the place of individual property. Before the Conquest "all lands were not only free, and under no constraint whatever, but were alienable and partible at the pleasure of the Thanes or free lords, by will or other deed, as held by book or public registry under free and common socage, thence called book-land; that is to say, under general allegiance to defend the crown and kingdom." Pakenham, Descent, 1766, p. 6.

"With pride and respectful gratitude we now look back to Alfred and many of his institutions which have remained and flourished in spite of the Normans. * * This violation of what would appear to be natural justice, * * was said to be justified by the occasion, and by the then state of society. For these simple and natural ideas of property, a new one was substituted by the feudal law, that all land was held upon the terms of military service, and thus all the landed property of the country became a part of a great military establishment." King, Law of Succession, 1855, pp. 24, 44.

[2]Sullivan, Lect. on Const. and Laws of Eng., vol. 1, p. 250, *et seq*; Dalrymple, Feudal Property, 4 ed., 1759, ch. 5, sec. 1, pp. 203–206; King, Law of Succession, 1855, pp. 23, 24, 44; Wright, Law of Tenures, 1734, pp. 172–175; Powell, Devises, pp. 2, 3; Coke, Litt., 111 b, note 138, by Hargrave.

[3]2 Kent, Com., 14 ed. pp. 327, 328; Coke, Litt., 111 b, note 138 by Hargrave; Windham *v.* Chetwynd, 1 Burr., 414, 419.

[4]There is no doubt that the purpose of the English Death Duties, first instituted in 1694 and still in force in various forms, are essentially and only taxation for governmental support. Trevor's Taxes on Succession, 1881, p. 3; Hanson's Death Duties, 1897, pt. 1, ch. 1, p. 1, *et seq*.

state is by grant to the grantee and his heirs forever. The patents of the United States are to the grantee, "his heirs or assigns."[1] If, in the case of such a grant, our opponents' doctrine of escheat were to be applied, then, in the language of Chancellor KENT,[2]

> "It would be a heartless and a fraudulent grant, with the deadly power of *escheat* concealed in its enclosure."

The implied condition that every person shall bear his proportionate share of the burdens of government is not now, as it was in feudal times, a condition annexed to particular grants. It is one which affects all property and all persons. Mr. Justice WOODBURY has well said:[3]

> "All the property in a state is derived from, or protected by, its government, and hence is held subject to its wants in taxation."

This condition, by its own terms, finds its necessary limitation in the needs of government; and reason suggests and the Constitution requires that the burdens of government shall be equal.

But the peace and order of society demand that title to property shall reside somewhere, and it is preeminently the end of government to secure peace and order. Therefore it is that we have a rule of law which provides for the escheat of property to the state —to the whole people, no one individual having a paramount right—upon an entire failure of individual ownership.[4] An entire absence of heritable blood in the case

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[1] 1 Stat. at Large, p. 468; 5 Stat. at Large, p. 417.

[2] Goodell *v.* Jackson, 20 Johns. (N. Y.), 693, 708.

[3] West River Bridge Co. *v.* Dix, 6 How., 507, 539.

[4] Otherwise, "The property would become vacant, and, according to its value, a thing to be scrambled for. Society, the very purpose and product of the social instinct, would be pulled apart upon the death of the first man

of a person who dies intestate is the foundation of the doctrine of escheat. In the language of Chancellor Kent,[1]

> "Government succeeds, as of course, to the personal and real estate of the intestate, when he has no heirs or next of kin to appear and claim it; but this is for the sake of order and good policy."

And again, adverting to the universality of this principle,[2]

> "That property should, in such cases, vest in the public, and be at the disposal of the government, is the universal law of civilized society."

Under the feudal system escheat had a different signification.[3] The rights of alienation and devise having been taken away, lands escheated or reverted upon failure of such issue as the feudal grant had designated.[4] But even this perversion of the doctrine of escheat did not apply to personal property.[5] The needs of the feudal government did not require that all the property of a subject should escheat; although it was forfeited for treason or felony.[6]

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having property enough to excite a scramble. * * The individual in the case of testacy, the State in the case of intestacy, is an intermediary." Bigelow, Wills, 1897, advance sheets in XI Harv. L. Rev., p. 74.

[1] 2 Kent, Com., 14 ed., p. 388.

[2] 4 Kent, Com., 14 ed., p. 425.

[3] The term "escheat" is indeed a product of the feudal system. 2 Blackstone, Com., p. 244; Spelman, Feuds and Tenures, 1723, p. 37; Coke, Litt., 92 b. But in the sense in which it was originally employed there is no such thing as escheat in American law. People *v.* Conklin, 2 Hill (N. Y.), 67, 74; Bradley *v.* Dwight, 62 Howard Pr. (N. Y.), 300-302; Wallace *v.* Harmstad, 44 Pa. St., 492, 501; 4 Kent, Com., 14 ed., p. 424.

[4] 1 Blackstone, Law Tracts, 1762, pp. 236, 237. 1 Pollock & Maitland, Hist. of Eng. Law, 1895, p. 332; and authorities in preceding note. "If the heirs of the tenant become extinct, there could be no one to enjoy the gift, or to return the services on which it was granted; then, too, it necessarily was resumed by the lord, and hence arose the right of escheat and reverter." Gilbert, Law of Tenures, Introd., p. 19.

[5] "All escheats, under the English law are declared to be strictly feudal, and to import the extinction of tenure." 4 Kent, Com., 14 ed., p. 423.

[6] 2 Blackstone, Com., pp. 251, 252.

It is therefore important to observe that a construction of the doctrine of escheat which would extend its operation to all property in complete derogation of the rights of inheritance and testamentary disposition would be far in excess of the most despotic and arbitrary acts of the feudal governments. According to the view advanced by our opponents, the Federal Constitution would be impotent to give to an American citizen any better standing in this court in respect of property than was accorded a traitor or a convicted felon by the English courts in the days of chivalry. The language of Mr. Justice PATTERSON in a famous case occuring in the early history of this country[1] is directly in point:

> "Every person ought to contribute his proportion for public purposes and public exigencies; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. * * The *English* history does not furnish an instance of the kind; the Parliament, with all their boasted omnipotence, never committed such an outrage on private property; and if they had, it would have served only to display the dangerous nature of unlimited authority; it would have been an exercise of power and not of right. Such an act would be a monster in legislation, and shock all mankind."

The power of the English sovereignty known as "corruption of blood" was expressly denied to the Federal Government and the power to pass bills of attainder denied to the states.[2] In the language of Chief Justice MARSHALL,[3]

> "A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. * * Such a law may inflict penalties on the person, or may inflict pecun-

[1] Vanhorne's Lessee *v.* Dorrance, 2 Dall., 304, 310.
[2] Federal Const., art. 1, sec. 9; art. 3, sec. 3.
[3] Fletcher *v.* Peck, 6 Cranch, 87, 138.

iary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate ?"

VII.

WRITERS WHO ADVOCATE THE RESTRICTION OF INHERITANCE AND TESTAMENTARY DISPOSITION IN FAVOR OF THE STATE ARE NOT AUTHORITIES IN THIS COURT.

It is true a number of social and political theorists have advocated the restriction of inheritance and testamentary disposition in favor of the whole community as a just means of preventing or checking the inequalities of wealth. That some of these have enjoyed a certain reputation as thinkers is not to be denied. That they had at the time of the adoption of our Constitution, and have now, a large following amongst certain classes is equally true. But their arguments are directed against the justice and the reasonableness of the principles upon which our constitutional guaranty of a right of property is based. Their attacks upon these principles produced the occasion for the adoption of this fundamental law. They assail now the Constitution itself, but while the Constitution stands they cannot be heard in this Court. The extravagant reveries of Rousseau, Condorcet or Godwin may not be endorsed by those who deny that they are striking at the foundations of individual liberty; but on this subject the vagaries of the most extreme socialist differ not in tendency but

merely in degree from the theories of John Stuart Mill and of the school which claims his leadership. We do not detract from the reputation of Mill by denying the application of his doctrine to our institutions. Some of his professed followers upon the general principles of economics have withheld their consent upon this point. The latest economic authority in England, Professor Nicholson, in Principles of Political Economy, 1893, p. 255, uses the following language :

> " He [Mill] proposes that the state should limit directly the amount received by any person, including the children, either by bequest or inheritance. But, in the present constitution of society, this is to abandon altogether the right of freedom of bequest, and, but for the eminence of the writer who makes the proposal, it is hardly worth serious consideration."

And the same writer, in Historical Progress and Socialism, 1894, p. 32, after tracing the tendency of this theory towards ideal socialism, arrives at the following significant conclusion :

> " But whatever might be the final result, there is no doubt about the period of transition from the present system to the ideal. If in the meantime socialism is to be regarded as a tendency--as a guide to political action—it can only operate through increasing as rapidly and as much as possible the taxes on land and capital, and the higher forms of professional income. No better device could be imagined for checking industrial progress, as is proved by the history of every country. It would be to introduce a creeping paralysis ; and, when the time was considered ripe for taking over the land and capital, the land would be a wilderness, and the capital old iron."

The most thoughtful and consistent of this school of political writers admit that the purpose of Mill's doctrine of state succession is, in its last analysis, to force a redistribution of wealth through the agency of legislation. Professor Seligman, the most able advocate of progressive taxation on successions in America, is

authority for this statement. He says, in Essays on Taxation, 1897, p. 127:

> "While there is some scientific justification for the doctrine as originally expounded, it is unquestionable that most of its defenders plant themselves squarely on the ground that it is the function of the state to check the aggregation of wealth into a few hands and to provide for the equalization of fortunes."

And, adverting to the application of this doctrine under American law, this writer in the work cited, pp. 126–128, says:

> "Even in the United States some of the commonwealth laws prohibit the bequeathing of more than a certain portion of the estate to charitable or public uses when there is a child, a widow or a parent. But, as a general rule, in English-speaking countries the right of bequest is free. It is well known that inheritance is older than bequest, and that the latter system was introduced into the Roman law, not to limit inheritance, but to provide heirs in default of near relations. The modern right of free bequest is, therefore, really opposed to the older family idea of property, which takes shape in the assertion of the right of inheritance. It thus becomes a very difficult question to decide how far inheritance may be demanded, as of right. Nevertheless, it may be said that most thinkers, as well as the mass of the public, would still to-day maintain the custom of inheritance, not indeed as a natural right or as a necessary consequence of the right of private property, but simply as an institution that is on the whole socially desirable. Even Mill says of his own scheme: 'The laws of inheritance have probably several phases of improvement to go through, before ideas so far removed from present modes of thinking will be taken into serious consideration.' * * In the United States, for instance, if regarded as a tax on property, the charge would conflict with the constitutional provision found in many commonwealths, requiring all property to be taxed equally."

And again, in respect of the application of this doctrine by the Federal Government, p. 129:

> "But since the federal government possesses no constitutional power to regulate inheritances, the federal in-

heritance tax was sustained as being neither such a regulation nor a direct tax on the land, but an excise on the right to succeed to the ownership of property."

Chancellor Kent did not fail to recognize the purpose and tendency of this doctrine. In unmistakable terms, he condemns it as attacking the foundation principles of our institutions. His language, as it appears in the Commentaries, Vol. 2, 14 ed., pp. 319, 327, 328, is as follows:

"There have been modern theorists, who have considered separate and exclusive property and inequalities of property, as the cause of injustice, and the unhappy result of government and artificial institutions. But the human society would be in a most unnatural and miserable condition, if it were possible to be instituted or reorganized upon the basis of such speculations. The sense of property is graciously bestowed on mankind, for the purpose of arousing them from sloth, and stimulating them to action; and so long as the right of acquisition is exercised in conformity to the social relations, and the moral obligations which spring from them, it ought to be sacredly protected. The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections.

"The exclusive right of using and transferring property follows, as a natural consequence, from the perception and admission of the right itself. * *

"In England, the right of alienation of land was long checked by the oppressive restraints of the feudal system, and the doctrine of entailments. All those embarrassments have been effectually removed in this country; and the right to acquire, to hold, to enjoy, to alien, to devise and to transmit property by inheritance, to one's descendants, in regular order and succession, is enjoyed in the fullness and perfection of the absolute right. Every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order and the reciprocal rights of others. The state has set bounds to the acquisition of property by corporate bodies; for the creation of those artificial persons is a matter resting in the discretion of the government, who have a right to impose such restrictions upon a gratuitous

privilege or franchise as a sense of the public interest or convenience may dictate. With the admission of this exception, the legislature has no right to limit the extent of the acquisition of property, as was suggested by some of the regulations in ancient Crete, Lacedæmon, and Athens; and has also been recommended in some modern utopian speculations. A state of equality as to property is impossible to be maintained, for it is against the laws of our nature; and if it could be reduced to practice, it would place the human race in a state of tasteless enjoyment and stupid inactivity, which would degrade the mind and destroy the happiness of social life."

Conclusion.

For the foregoing reasons and those set forth in the brief of the principal argument, it is earnestly submitted that the Illinois Inheritance Tax Law should be declared unconstitutional. Such a decision will not tend to lessen the taxing powers of the State of Illinois or to embarrass or cripple it in the collection of needed revenue. The Legislature can remodel the act and impose a succession tax equally and proportionately upon a fair and reasonable classification and at such rate as may be deemed necessary or expedient for the requirements of the State.

Washington, January 24, 1898.

Benjamin Harrison,
William D. Guthrie,
Eugene E. Prussing.
Of counsel for plaintiffs in error and appellant.

No. 425, 463 & 464.
Appx to Brief of Harrison, Guthrie & Pressing for P. E.

ILLINOIS INHERITANCE TAX CASES.

Filed Jan. 24, 1898.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Nos. 425, 463, 464.

JOSEPHINE C. DRAKE *et al.*, Executors, &c.,
Plaintiffs in error,

vs.

DANIEL H. KOCHERSPERGER, County Treasurer, &c., of Cook County, Illinois.

Error to the Supreme Court of the State of Illinois.

ELIZABETH EMERSON SAWYER *et al.*, Executors, &c.,
Plaintiffs in error,

vs.

THE SAME.

Error to the Circuit Court of the United States for the Northern District of Illinois.

JESSIE NORTON TORRENCE MAGOUN,
Appellant,

vs.

ILLINOIS TRUST AND SAVINGS BANK, as Executor, &c., of JOSEPH T. TORRENCE, deceased, and DANIEL H. KOCHERSPERGER, County Treasurer, &c.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

OPINION OF JUDGE CARTER IN THE DRAKE CASE, COUNTY COURT, COOK COUNTY, ILLINOIS.

COUNTY COURT, COOK COUNTY, ILLINOIS.

OPINION FILED NOVEMBER 20, 1896.

The People ex rel. D. H. Kochersperger, County Treasurer, In re Drake Estate.

THE ILLINOIS LAW TAXING INHERITANCES UNCONSTITUTIONAL AND VOID.

Held, that the Illinois Law of 1895 (Hurd's Revised Statute, 1895, page 316) taxing gifts, legacies and inheritances in certain cases, and to provide for the collection of the same for the reasons stated in the opinion, is unconstitutional and void.—[ED. CHICAGO LEGAL NEWS.]

CARTER, J.—In this case the constitutionality of an act passed by the legislature in 1895, to tax gifts, legacies and inheritances in certain cases, and to provide for the collection of the same, is questioned. The act is quite lengthy, but the points discussed are found in the first section, which provides in substance that the beneficial interest to any property or the income therefrom, which shall pass by will or be transferred by deed, grant, sale or gift made in contemplation of death, to or for the use of any father, mother, husband, wife, child, brother, sister, wife or widow of the son, or husband of the daughter, or to children adopted, shall be taxed one dollar on every one hundred dollars of the clear market value of such property received by each person and at the same rate for every less amount, provided that any estate which may be valued at a less sum than $20,000 shall not be subject to any such duty or tax; the tax to be levied in above cases only on the excess of $20,000 received by each person. When the beneficial interest to any property or income therefrom shall pass to or for the use of any uncle, aunt, niece, nephew or any lineal descendant of the same, the rate of tax shall be two dollars on every one hundred dollars in excess of $2,000 received by each person. In all other cases the rate shall be as follows: on each and every one hundred dollars of the clear market value of the property and at the same rate for any less amount, on all estates of $10,000 and less, $3; on all estates of over $10,000 and not exceed-

ing $20,000, $4; on all estates over $20,000 and not exceeding $50,000, $5; on all estates over $50,000, $6; excepting in each of these cases property valued at a less sum than $500.

When the case was presented on oral argument there was some question as to whether the County Court or Probate Court had jurisdiction of this matter, but it was finally agreed by all parties that the County Court had jurisdiction, and a reading of sections 18 and 20, article VI of the constitution, together with the decisions in *Knickerbocker* v. *People*, 102 Ill. 218; *Klokke* v. *Dodge*, 103 Ill. 125, and other decisions of our Supreme Court, with reference to the jurisdiction of the County and Probate Courts, would indicate that this was the correct conclusion.

The Probate Court has a special or limited jurisdiction, carved out, as it were, from the original jurisdiction of the County Court, having, in counties where it exists, a portion of the jurisdiction of the County Court, but the County Court retaining all jurisdiction which has not been specifically granted to the Probate Court, and with the rest retaining jurisdiction over proceedings for the collection of taxes and assessments.

This is the first inheritance tax law in Illinois, although an act passed by the Illinois Legislature in 1887, for the purpose of making the Cook County Probate Court self sustaining, had some of the features of a tax on inheritance. This act provided that on the grant of letters a docket fee should be paid according to the following schedule. When the estate did not exceed $5,000, $5; when the estate exceeded $5,000, and did not exceed $20,000, $10; when the estate exceeded $20,000 and did not exceed $50,000, $20; when the estate exceeded $50,000 and did not exceed $100,000, $50; when the estate exceeded $100,000 and did not exceed $300,000, $100; when the estate exceeded $300,000, and did not exceed one million, $250, and amounts in $1,000,000 and upward, $1,000. In 1891 the law was amended, making charges of $5 for estates that did not exceed $5,000 and $1 for every $1,000 additional with certain exceptions. I am informed that this law has been followed in the collection of fees in the Probate Court since 1887, and since 1891 as amended, and that the constitutionality of the act has never been contested.

While the inheritance tax law is new in Illinois, its prin-

ciples have been followed from a very early date. The origin of the tax has usually been attributed to the Romans, though there is ground for the belief that the Romans borrowed the idea from the Egyptians. During the Middle Ages the inheritance tax idea was incorporated in the Feudal Tenure. The last of the 18th century, Pitt adopted the system in England. It is now very generally in use in the countries of Europe and in all English possessions. Dos Passos on Inheritance Tax Law, Chap. 1; Max West "The Inheritance Tax," Vol. 4, No. 2, of Studies in History, Economics and Public Law, pp. 37 to 56.

In 1794 the special revenue committee of the national house of representatives recommended a system of stamp duties, including receipts for legacies. In 1797 a graded tax was levied on legacies and shares of personal estates when the amount was more than fifty dollars. This act was repealed in 1802. In 1862 a revenue act was passed which had a legacy tax graduated, from three-fourths of one per cent on lineal issue, lineal ancestors, brothers and sisters, up to five per cent on strangers to the blood, bodies politic or corporate, and collateral relatives further removed than brothers and sisters of grandfather or grandmother. This tax was payable only when the entire personal estate of the decedent exceeded $1,000. There was also a graduated tax on probating wills, varying with the amount of the estate from fifty cents on $2,500 to twenty dollars on an estate of $150,000 and charging ten dollars for every additional $50,000. United States Statutes at Large, Vol. 12, 483.

In 1864 an amendment was passed to the original revenue law, levying a succession tax on real estate. The exemptions in this were the same as in the original act. The rate of this succession tax was graded as follows: Lineal issue, lineal ancestors, brothers and sisters, one per cent; descendants of brothers and sisters, two per cent; brothers and sisters of father or mother, and descendants thereof, four per cent; brothers and sisters of grandfather and grandmother, and descendants thereof, five per cent; other collateral relatives, strangers in blood and bodies politic or corporate, six per cent; United States Statutes at Large, Vol. 13, 285, 287.

This statute as to a succession tax was decided constitutional by the Supreme Court of the United States in *Scholey*

v. *Rew*. 23 Wall. 331. After several amendments and modifications this act was entirely repealed in 1872.

Inheritance tax laws were adopted in Pennsylvania in 1826; Louisiana, 1828, repealed in 1877, re-enacted in 1894; Maryland, 1844; Delaware, 1869; New York, 1885; West Virginia, 1887; Massachusetts, Connecticut, New Jersey, Ohio and Tennessee in 1891; North Carolina in 1846, repealed in 1883; in Virginia in 1844, repealed in 1855, re-enacted in 1863 and repealed in 1884; Maine and California in 1893: Dos Passos on Inheritance Tax Law, Chap. 1; Max West, "The Inheritance Tax," *supra*, 63–94, inclusive.

In nearly all of these States there is a graded tax, the classes of beneficiaries depending upon their blood relation to the decedent. In all of these States, except Ohio, where the Supreme Courts have been called upon to pass on the constitutionality of the act, it has been upheld: *Strode* v. *Commonwealth*, 52 Pa. 181; *Eyre* v. *Jacob*, 14 Gratt. 422; *Peters* v. *Lynchburg*, 76 Va. 929; *Tyson* v. *State*, 28 Md. 577; *State* v. *Dalrymple*, 70 Md. 298; *State* v. *Hamlin*, 86 Me. 495; *Minot* v. *Winthrop*, 162 Mass. 113; *In re McPherson*, 104 N. Y. 310; *State* v. *Alston*, 94 Tenn. 674; *Pullen* v. *Commissioners*, 66 N. C. 361.

Inheritance taxes have been declared unconstitutional for various reasons in Wisconsin, New Hampshire, Minnesota and Ohio: *State* v. *Mann*, 76 Wis. 469; *State* v. *Gorman*, 40 Minn. 232; *Curry* v. *Spencer*, 61 N. H. 630; *State* v. *Ferris*, 41 N. E. Rep. 519, 53 O. 314.

In Minnesota and Wisconsin the laws in question levied probate taxes or duties rather than succession taxes or duties. In Wisconsin it was decided not to be a uniform tax and one of the reasons for declaring it unconstitutional was that it applied only to Milwaukee County, and therefore was special legislation. The Minnesota law had a graded fee, varying from $10 to $5,000 divided into twelve classes, and seemingly having little reason to support the classification. Since this decision, the constitution of Minnesota has been amended so that an inheritance tax, uniform, graded or progressive, can now be levied in that State. The reasoning in the New Hampshire decision is the only one which declares the tax unconstitutional on grounds which would apply to inheritance taxes in general. The Ohio decision, while upholding the general idea of the inheritance tax,

decided the law unconstitutional because the classification and certain exemptions did not give equal protection to all. The decisions in all these four States have a greater or less bearing on the constitutionality of the act in this State.

It is strenuously contended that the tax inheritance law in this State is in contravention of section 1 of article 9 of the constitution of 1870, which reads as follows: "The general assembly shall provide such revenue as may be needful by levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

In discussing the constitutionality or validity of a statute it should be remembered that all courts hesitate to interfere with legislative action. The presumption is in favor of the validity of the law. Our Supreme Court have said frequently that "every reasonable doubt must be resolved in favor of the action of the legislature and that where such doubt exists the statute must be sustained." *People* v. *Nelson*, 133 Ill. 565, 575.

While this is true, yet there are times when the legislature has so clearly exceeded its power that it is necessary for the courts to decide against the validity of the statute. "But there are still other cases where it is entirely possible for the legislature so clearly to exceed the bounds of due authority that we cannot doubt the right of the courts to interfere and check what can only be looked upon as ruthless extortion, provided the nature of the case is such that judicial process can afford relief. An unlimited power to make any and everything lawful which the legislature might see fit to call taxation, would be, when plainly stated, an unlimited power to plunder the citizen. Cooley on Constitutional Limitations, 4th Ed. par. 488, p. 608.

If this inheritance tax is a tax in the ordinary sense of the term, counsel argue that it is not in proportion to the value of the property, and if it is a tax on privilege, it is not uniform as to the class upon which it operates, and that the exemptions in the act are unconstitutional. Courts and law writers have frequently said that the right to succeed to property, either by will or inheritance, is entirely within legislative control ; that it is a mere privilege which can be changed or modified or repealed at the discretion of the State. 2 Kent's Com. 325 ; Dos Passos on Inheritance Tax Law, par. 2, page 6 ; Blackstone's Com., Book 2, page 10.

In the recent case of the *United States* v. *Perkins*, 163 U. S. 625, 628, holding the tax inheritance law of New York constitutional, Mr. Justice Brown says, in discussing the tax inheritance law, that "It is a tax, not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. * * * For the tax is not a tax upon the property itself, but upon its transmission by will or descent." *Major* v. *Grima*, 8 How. 493 ; *U. S.* v. *Fox*, 94 U. S. 315.

Some of the decisions hold that it is a tax upon the privilege of receiving, rather than a tax upon the right to dispose of property. "It must be borne in mind that the tax is not upon the property, but upon the right or privilege of acquiring it by succession. It is a condition upon which the person may take the estate of a deceased relative by inheritance, or of a testator by his will. * * * It is not a tax upon the right of alienation, but upon the privilege of receiving by inheritance, or will, or otherwise, at the death of the former owner." *State* v. *Alston*, 94 Tenn. 674 ; *State* v. *Ferris*, 53 Ohio, 314.

The statement that the right of any person to succeed to the property of a deceased person, whether by will or inheritance, is a creature of the statute law, must be held, in my judgment, to be true only within reasonable limits. The right of children and near relatives to succeed to property has been recognized so long by legislatures and courts that it has become almost to be considered as a natural right. As was said by Mr. Justice Brown in *U. S.* v. *Perkins*, *supra*, "The general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to

inherit property of the parents. We know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to public good."

And I am not entirely clear that this natural right of children to inherit from their parents was not recognized by the common law. In discussing the statement found on page 11, Chap. 1, Book 2, of Sharswood's Blackstone, that the permanent right of property "vested in the ancestor himself was not a natural but merely a civil right," the commentator, Christian, says, as found in a footnote at the bottom of said page 11, "I cannot agree with the learned commentator that the permament right of property vested in the ancestor himself (that is for life), was not a natural, but merely a civil right. I have endeavored to show that the notion of property is universal, and is suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinement. If the laws of the land were suspended, we should be under the same moral and natural obligation to refrain from invading each others' property as from attacking and assaulting each others' persons. I am obliged also to differ from the learned judge and all writers upon general law who maintain that children have no better claim by nature to succeed to the property of their deceased parents than strangers, and that the preference given to them originates solely in political establishments.

"I know no other criterion by which we can determine any rule or obligation to be founded in nature than its universality and by inquiring whether it is or not and has not been, in all countries and ages, agreeable to the feelings, affections, and reason of mankind. The affection of parents toward their children is the most powerful and universal principle which nature has planted in the human breast, and it cannot be conceived, even in the most savage state, that anyone is so destitute of that affection and of reason, who would not revolt at the position that a stranger has as good a right as his children to the property of the deceased parent."

This belief is so strong in the minds of all that it has been found that an inheritance tax to be paid by near relatives is much more difficult to collect than an inheritance tax to be paid by collateral relatives and strangers. Then, too, the limiting of this right by the legislature must be reasonable.

The tax on the right to receive cannot be so great as to practically amount to confiscation of the property. The State "cannot impose a tax which shall be equivalent, or almost equivalent, to the value of the property, and can not so limit the persons who take as heirs, devisees, distributees or legatees, that the great mass of all the property of the inhabitants must become vested in the commonwealth. * * * This right must be exercised in a reasonable way." *Minot* v. *Winthrop*, 162 Mass. 113, 117.

However this tax may have been variously defined, it is considered by all the courts who have upheld its constitutionality as nothing more than a burden, *bonus*, duty, assessment or excise levied by the government upon the devolution, transmission, passing or privilege of transmitting or receiving property under wills and intestate laws: *Minot* v. *Winthrop*, 162 Mass. 113; *Strode* v. *Commonwealth*, 52 Pa. 181; *Eyre* v. *Jacob*, 14 Grat. 431; *Schoolfeld* v. *Lynchburg*, 78 Va. 366; *State* v. *Dalrymple*, 70 Md. 298; *Scholey* v. *Rew*, 90 U. S. 331; *In re Meriam's Est.*, 141 N. Y. 479; *State* v. *Hamlin*, 86 Me. 495.

Other constitutional objections have been urged against this law, but the principal point made against it, as in all the other States where the constitutionality of the tax inheritance law has been contested, is the lack of equality and uniformity. The constitutions of the other States in which the courts have passed on the tax inheritance law, nearly all contain provisions requiring equality and uniformity as to taxation, very similar to those in the constitution of this State.

There has been much discussion by the courts as to the meaning of the word "uniform." The United States Supreme Court has been called upon to give a construction to this word under the clause "all duties, imposts and excises shall be uniform throughout the United States:" Article 1, section 8, U. S. Constitution. In the income tax decisions counsel on both sides argued at great length with reference to the meaning of this word; those who advocated the constitutionality of the income tax, claiming that "the rule of uniformity in the Federal constitution is geographical in character and means that the taxes must be the same in each State that they are in every other State." On the other side counsel contended that the word not only required geographical uniformity, but that the citizens respectively of all States should

be taxed by a uniform rule. In the head money cases, 112 U. S. 580, the constitutionality of the act of August 3, 1882, was questioned because in levying "a duty of fifty cents for each and every passenger, not a citizen of the United States, who shall come by steam or sailing vessel from a foreign port to any port within the United States," they claimed that the tax was not uniform because it discriminated between transporters by sea and transporters by land. Mr. Justice Miller said in that case, p. 594, "the uniformity here described has reference to the various localities in which the tax is intended to operate. 'It shall be uniform throughout the United States.' The tax is uniform and operates with the same force and effect in every place where the subject of it is found."

Mr. Justice Miller, in his lectures on the constitution, page 240, 241, has said on this same subject, referring to duties, excises and imposts, "they are not required to be uniform as between different articles that are taxed, but uniform between the different places and different States. Whisky, for instance, shall not be taxed any higher in the State of Illinois or Kentucky, where much more of the article is produced, than it is in Pennsylvania. The tax must be uniform on the particular article, and it is uniform in the meaning of the constitutional requirements if it is made to bear the same percentage over all the United States. That is manifestly the meaning of this word as used in this clause. The framers of the constitution could not have meant to say that the government, in raising its revenue, should not be allowed to discriminate between the articles which it should tax." *Bell's Gap R. R. Co.* v. *Pa.*, 134 U. S. 232, 237.

In the railroad tax cases, 13 Fed. Rep. 773, Mr. Justice Sawyer in a concurring opinion says. "Classification should have reference to the different character, situation and circumstances of the property, making a different form or mode of taxation proper if not absolutely necessary. It can not be arbitrarily made with mere reference to the nationality, color or character of the owners, whether natural or artificial persons, without any reference to a difference in character, situation or circumstances of the property."

Mr. Justice Lamar, in the case of *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 351, says, "This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of

property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation and that a system which imposes a tax upon every species of property, irrespective of its nature and class, will be destructive to the principle of uniformity and equality of taxation and of a just adaptation of property to its burdens."

In the income tax cases the Supreme Court did not decide the law with reference to this question of uniformity, although it may be inferred from their first opinion that the court was evenly divided on the construction to be put upon this word, as presented in that case.

It is evident from these decisions that the United States Supreme Court has never held that the constitution specifically provided a classification of property for taxation, subjecting one kind of property to one rate of taxation and another kind of property to a different rate; while this is true these cases also show that it was possible to distinguish between franchises, licenses, privileges, and visible and tangible property, and between real and personal property; but that property could be classified by putting articles of the same kind and in the same condition and used for the same purpose in the same class, and then all in a given class must be taxed by a uniform rule without regard to its ownership.

This doctrine of classification, which is not found in any place in the United States constitution, except as that construction has been given by the court to the word "uniform," has been provided for in terms in the last part of section 1 of article IX of the constitution of Illinois, by stating that all taxes on privileges, etc., shall be levied in such manner as the general assembly "shall from time to time direct by general law, uniform as to the class upon which it operates."

This principle of uniformity runs through all legislation and all decisions in this State with reference to taxes. The United States, by the decisions of the courts, has decided that the taxation must be uniform in its operation upon all of the same class. Our State has prescribed that rule in the constitution. Does this law contain provisions which are not in harmony with this section of the constitution and this principle of taxation? It is insisted that the class division of this law is unjust and discriminating and that there are exemptions in the law that are not at all consistent with the spirit of our constitution and

with the decisions of this State. In order to find whether this be true or not, it is necessary to refer at some length to the decisions of our Supreme Court bearing upon this question.

In the case of *People* v. *Thurber*, 13 Ill. 554, it was held that charging three per cent on the amount of premiums charged by the agent of insurance companies, to be paid over to the county clerk and by him paid into the State treasury, was not in violation of the constitution, which provided that all taxation should be by a valuation of property to be taxed, and should be uniform ; and that there was no impropriety in compelling each one to contribute in proportion to the amount of business done or money received, and that a license was not a tax in the constitutional sense of the term.

In *City of East St. Louis* v. *Wehrung*, 46 Ill. 392, it was stated in discussing the dram shop license question that "An ordinance which merely discriminates between different localities in a city, according to the advantages they may present for the business for which license is sought, leaving all persons at equal liberty to apply for license in whatever locality they think proper, and making no distinction between persons, but between places only, is open to no objection. Such an ordinance would be founded on the self-evident fact that a business may be conducted with much more profit in some streets of a town than in others, and the privilege, therefore, more valuable."

In *Walker* v. *City of Springfield*, 94 Ill. 364, 374, it was held that the power to charge a license fee on foreign insurance companies transacting business in a State was not in contravention of this section of the constitution. That it was not a tax and that the first section related only to taxes, but states that even if it was a tax, "the 30th section of the insurance law is general, and operates uniformly on the class to which it applies. And it undeniably applies uniformly to all, making no exceptions in favor of or against any one of them." See also *Wiggins* v. *Chicago*, 68 Ill. 372; *Chicago* v. *Bartee*, 100 Ill. 57; *Howland* v. *City of Chicago*, 108 Ill. 496; *Braun* v. *Chicago*, 110 Ill. 186; *Kinsley* v. *City of Chicago*, 124 Ill. 359.

The Dram Shop Act passed in 1883, by which cities, towns and villages are prohibited from granting licenses for the keeping of dram shops except on payment of a sum not less than at the rate of five hundred dollars per annum or not less

than one hundred and fifty dollars per annum when the license is for the sale of malt liquors only, was contested on the ground of its constitutionality, and the Supreme Court said in *Timm* v. *Harrison*, 109 Ill. 600, in discussing whether the act in question was in conflict with section 1 of article IX of the constitution, because the money payment required was not uniform as to the class upon which it operates, "it is insisted that the money required to be paid is for revenue and is a tax within the intent and meaning of the constitution; that the class named in the constitution is liquor-dealers; that the act in question imposes a minimum tax of one hundred and fifty dollars on venders of malt liquors and five hundred dollars on venders of other intoxicating liquors, and it is therefore not uniform on the class upon which it operates, and hence is unconstitutional. Conceding, for the purpose of the argument, that the license fee exacted by the act in question is a tax within the meaning of the constitution, we are of the opinion that the act is not in conflict with the rule of uniformity as to the class upon which it operates. The term 'liquor dealers,' used in the section above of the constitution is, as we regard, used in a generic sense. There may be different classes and varieties included under the general description 'liquor dealers,' and we think it is competent for the general assembly to classify the different kinds of liquor dealers included in the general description as used in the constitution, and impose differential taxes upon such classes—that the rule of uniformity in taxation would not be violated so long as the tax imposed is the same upon all members of the particular class. The line of division into classes here made, based upon the sale of malt liquors as distinguished from more intoxicating drinks, if viewed as for taxation, is a quite natural and a reasonable one, and not out of harmony, in our view, with any feature of the constitution in respect of taxation." To the same effect also is the case of the *U. S. Distilling Company* v. *City of Chicago*, 112 Ill. 19.

In the case of *Dennehy* v. *City of Chicago*, 120 Ill. 627, the Supreme Court decided that a city or village incorporated under the town law, had the power not only to license dram shops to sell intoxicating liquors at retail, but also the further power to exact a license for the sale of liquors in larger quantities than one gallon, classifying such license as a license

for wholesale liquor dealers, as distinguished from the dram shop license.

In the case of *The City of Cairo* v. *Feuchter*, 159 Ill. 155, it was held that a city ordinance which provided that every person or persons selling or giving away intoxicating liquors, malt, vinous, mixed or fermented liquors, within the limits of the city of Cairo, in quantities of five gallons or more, should be deemed a wholesale liquor dealer, and that every wholesale liquor dealer should pay the sum of one hundred dollars a year for a license, but that this ordinance would not apply to a person or persons who hold a valid license for the sale of liquors in less quantities than one gallon, was unjust, unreasonable and void. The Supreme Court say : "The power of the city to classify is not denied, but we are of the opinion that the ordinance in question makes an unjust discrimination between persons coming within the same class, and imposes burdens on some from which others are, by its terms, exempted, and that the ordinance is therefore void.

All of the decisions in Illinois which I have cited on this question, except the last, are held not to be in conflict with section 1 of article IX of the constitution, because a license fee was not a tax. Some of the decisions, as *Walker* v. *Springfield*, *supra*, *Timm* v. *Harrison*, *supra*, and *Dennehy* v. *Chicago*, *supra*, discuss the license fee as a tax and say that even if it be a tax it is uniform as to the class upon which it operates. In the case of *City of Cairo* v. *Feuchter*, *supra*, the decision seems to have been written as if the license fee provided for in the ordinance was a tax within the meaning of this section of the constitution.

Because of the distinction that the Supreme Court has made between a license fee and a tax within the meaning of the constitution, these decisions are not as decisive on the statute here in question as they otherwise would be, but the reasoning in some of them can be applied to the case at bar.

An act was passed by the legislature of this State in 1823, dividing the lands to be assessed into three classes, and fixing the valuation at $2, $3 and $4, respectively. In *Reinhart* v. *Schuyler*, 2 Gilm. 473, it was decided that such a law was not unconstitutional as in contravention of the idea of uniformity provided for. As this method of taxation by classification had been acquiesced in for years, any other decision would have been very disastrous to titles and doubtless should not be con-

strued as of as much force on this point as if the decision had been rendered upon the constitutionality of the law immediately after it was passed.

In the case of *Porter et al.* v. *R. R. I. & St. L. R. R. Co.*, 76 Ill. 561, the constitutionality of the law of 1872 for taxing railroad corporations was questioned, and it was insisted that in assessing the capital stock and franchise, a different rule was adopted than applied to other property. The Supreme Court say, page 579: "It surely can not be doubted that the requirement that the board of equalization shall ascertain and determine the fair cash value of the capital stock, including the franchise of all companies and associations now or hereafter created under the laws of this State over and above the assessed value of the tangible property of such company or association, is a general law, or that it is uniform as to the class, upon which it operates. It is not restricted to any particular part of the State, nor is it limited to a special tax; it extends to the entire State for the purpose of general taxation, and it applies the same rule to all within the same class upon which it operates. * * * It is only required that they (corporations) shall be taxed in such manner as the general assembly shall from time to time direct by general law, and the only uniformity required is as to the class upon which such general law shall operate."

In the case of *Coal Run Coal Company* v. *Finlen*, 124 Ill. 666, 670, the Supreme Court say: "The section of the constitution undoubtedly requires the law the general assembly may enact, to be a general law, and uniform as to the class upon which it operates; but this does not prohibit the legislature from classifying the corporations for taxation. We see nothing in the constitution which prohibits the legislature from providing one method for determining the value of the capital stock, including the franchise, of a railroad company, another method for a mining corporation, and still another for manufacturing corporations. We see no clause in the constitution which prohibits the legislature from placing certain specified corporations in one class, and providing a uniform method of assessment for that class, and placing certain other specified corporations in another class, and providing a uniform manner of assessment for that class. There is no language whatever used in the clause of the constitution which forbids the legislature from forming a class, and

after the class is formed, it is declared that the general assembly shall have power to tax corporations owning franchises, in such manner as it shall direct." See also *Ottawa Gas Light & Coke Co.* v. *Downey*, 127 Ill. 201; *Sterling Gas Co.* v. *Higbee*, 134 Ill. 557.

It must be kept in mind in discussing this question that the power of the legislature over the subject of taxation is unbounded, except as limitations may be prescribed by the constitution. The constitution is not a delegation of a power to tax, but is a restriction on that power. *Du Page Co.* v. *Jenks*, 65 Ill. 277; *Eurigh* v. *People*, 79 Ill. 214; *State* v. *Ferris*, 53 Ohio, 314; *In re McPherson*, 104 N. Y. 306.

Some of the courts, in the decisions on the constitutionality of a tax inheritance law, have stated that it was not an ordinary tax and that it was not in contravention of the constitution where those decisions were rendered, because it was in the nature of a special tax or duty, or more exactly, an excise, not falling within a regular annual tax on property, being only occasional and exceptional, and was therefore not contemplated and provided for and guarded by the constitutional provisions or limitations with reference to the equality or uniformity of taxation. *State* v. *Hamlin*, 86 Me. 495, 501; Dos Passos on Inheritance Tax Law, page 47, par. 18.

While it is not entirely clear to my mind that sections 1, 2 and 3 of article IX of our constitution cover the entire range of all property of every kind and nature to be taxed, and of all kinds of taxes, whether general or special, excises or duties, yet I am of the opinion, from the wording of the last part of section 1, that the reference to taxes on privileges being uniform as to the class, in view of the definition of a tax on inheritance, as given by all of the courts and text writers who have defined this tax, that a tax on inheritance in this State should be held to come under the head of a tax on privilege as provided for in section 1 of article IX, and that therefore the tax must be by "general law, uniform as to the class upon which it operates." *Loan & Homestead* v. *Keith*, 153 Ill. 609; *Timm* v. *Harrison*, *supra*; *Cairo* v. *Feuchter*, *supra*.

Who has the power of classifying? Who shall say whether one person or corporation belongs to one class or to another class? It is evident from the decisions from which we have

quoted that this power rests with the legislature in the first instance. "There is no language used in the clause of the constitution which forbids the legislature from forming a class. * * * What object the general assembly may have had in placing mining corporations in one class for assessment, and corporations organized for manufacturing, printing or for the breeding of stock in another class, is not for us to inquire. So long as the statute does not conflict with the organic law, it will be upheld, whether wise or unwise." *Coal Run Coal Co.* v. *Finlen*, 124 Ill. 671.

Does our Supreme Court mean to say that in no instance the court shall interfere to decide as to classification? That the sole power rests with the legislature and cannot be reviewed by the courts, no matter how arbitrary, unreasonable or capricious the classification may be? I do not think this is a fair deduction from all of the decisions in this and other States. The only inference that can be drawn from the *Timm* v. *Harrison*, *supra*, and *Cairo* v. *Feuchter*, *supra*, is that the division must be reasonable.

In the case of *Commonwealth* v. *Delaware Div. Canal Co.*, 123 Pa. 594, 620, Mr. Justice Clark says: "It may be conceded, however, that classification should be made according to some reasonable, practical rule, which would prevent a gross inequality in the burden of taxation. It must visit all alike in a reasonable, practical way, of which the legislature may judge, but within the just limits of what is taxation. Like the rain it must fall upon all the people in districts and by turns, but still it must be public in its purpose and reasonable, just and equal in its distribution, and can not sacrifice individual right by palpably unjust exaction." *Commonwealth* v. *Brewing, Co.*, 145 Pa. 83, 86.

The legislature can divide, for the purpose of taxing, into such classes as they may deem wise, provided that the classification adopted shall not be arbitrarily founded upon mere whim or caprice, but the classification must be such that it can be referred to some considerations of public policy. Whenever the legislature creates a class for the purpose of taxation, and bases the classification on grounds and reasons which are public in their nature, the classification being natural and reasonable, even though it be one upon which legislators might honestly differ, some claiming it wise and others unwise, in such a case the courts can not interfere with the classifica-

tion. But if it is purely arbitrary and justified by no public purpose, then, if the evil arising from such classification is of any magnitude, under all decisions it is the duty of the court to interfere.

It is urged that the classification in this inheritance tax law is unreasonable and arbitrary, in that it places father, mother, husband, wife, children, brother, sister, etc., in one class; uncle, aunt, niece, nephew, in another class and all others in a third class, and that this third class is arbitrarily divided not as to persons composing the various classes, but as to the amount of money the persons are to receive. It is also urged that the exemptions in the first and second classes are unreasonable and arbitrary; that if you do not call the $20,000 an exemption, then the first class is subdivided into two classes and that this division is unfair. The same argument is made as to the $2,000 exemption in the second class, and it is urged with great force as to the subdivision of the third class. The United States legacy laws, which we have quoted above, and the tax inheritance laws of all, or nearly all, the States, separate classes, according to the nearness of the relationship of the beneficiary to the decedent. In a great majority of the States, the father, mother, wife and children are classed together and in a large number of the States are entirely exempt from taxation. "To make a distinction between collateral kindred or strangers in blood and kindred in a direct line, in reference to the assessment of such a tax, either by exempting the kindred in direct line or by imposing on collaterals and strangers a higher rate of taxation, has the sanction of nearly all the States which have levied taxes of this kind. It has a sanction in reason, for the moral claim of collaterals and strangers is less than that of kindred in the direct line, and the privilege is therefore greater." *Minot* v. *Winthrop*, 162 Mass. 123; Dos Passos on Inheritance Tax Law, page 48.

As in all the States where the tax has been upheld, there has been somewhat similar classification as to lineal descendants, collateral kindred, and strangers to the blood, it is fair to assume that all of the courts have considered this a reasonable classification. If it is considered that our law only divides into the three classes enumerated, such classification is reasonable and not in contravention of the constitution. It may be doubted if the $20,000 exemption so-called in the first

class, if it should be held an exemption according to the ordinary use of that term, be not in conflict with the constitution because the amount exempt is unreasonably large. *Loan & Homestead* v. *Keith*, 153 Ill. 509.

On the reasoning in some of the cases it may be urged that as the tax inheritance law brings new property in for taxation, this $20,000 which is not to be taxed, is really not an exemption. This is a general law and operates uniformly as to all in this class. The beneficiary who receives $25,000 is not taxed on $20,000 of the $25,000; and the beneficiary who receives only $20,000 or less is not taxed at all, all in this class being treated alike. Under the decisions of this State the legislature could lawfully pass an act charging liquor dealers a license only when they sell in quantities greater than one gallon, and allowing all who sell in less quantities than that to sell without a license. If such a law would not be in contravention of the constitution, and it certainly would not under the decisions, then can not this so-called $20,000 exemption in the first class be justified on the same ground? The courts have repeatedly held that all of the lineal descendants could be entirely exempt. If this be so, is it not possible to justify the so-called exemption of $20,000 in the first class, on the principle that the greater includes the less, and if the greater can be exempt, the less can? All are treated alike. The man who receives more than $20,000 is only taxed on the excess. He receives his $20,000 without paying any tax on it, the same as every other person in this class.

In the case of *Minot* v. *Winthrop*, *supra*, the Supreme Court of Massachusetts has said that a $10,000 exemption which applied to an entire estate of a decedent was not so clearly unreasonable as to render the statute unconstitutional. In the case of *Ferris*, *supra*, the circuit judge in Ohio, in deciding the case in discussing a statute similar to ours, said that if the statute exempted $20,000 or any other sum of every estate from taxation, it would not, in his judgment, be unequal and invalid.

If the so-called $20,000 exemption in first class is not unconstitutional, for a much greater reason the so-called $2,000 exemption in the second class must be held valid.

It is with the third classification that the greatest difficulty is met. This portion of the law reads: "In all other cases the rate shall be as follows: On each and every $100 of the

clear market value of all property and at the same rate for any less amount, on all estates of $10,000 and less, $3 ; on all estates of over $10,000 and not exceeding $20,000, $4 ; on all estates of over $20,000 and not exceeding $50,000, $5, and on all estates over $50,000, $6 ; provided that an estate in the above case which may be valued at a less sum than $500, shall not be subject to any duty or tax." If this be considered as one class, are all persons within this class taxed alike? Certainly not. Those who receive less than $10,000 pay three per cent; those who receive between $10,000 and $20,000 pay four per cent ; those who receive between $20,000 and $50,000 pay five per cent, and above $50,000, six per cent. Considered as one class this must certainly be held invalid under the constitution. Does the legislature have the power in its wisdom to make classes of beneficiaries according to the amount that they receive? Is such a division purely arbitrary, or can it be justified in reason and public policy? No court, so far as I have been able to learn, in this country, has sustained as radical a classification as this division now under discussion. Minnesota on the Probate Tax Law heretofore referred to, decided it unconstitutional. In the case of *State* v. *Ferris*, 53 Ohio, 336, the Ohio Supreme Court in June, 1895, decided a law which had a somewhat similar classification, divided on the basis of the amount of money received by the beneficiary, unconstitutional, saying that "the right to receive the first $20,000 in an estate not exceeding that sum is protected from taxation, while the right to receive the first $20,000 of an estate exceeding that sum is taxed $200. This is not equal protection. Again, the right to receive $50,000 worth of property of an estate not exceeding that sum is taxed $500, while the right to receive $50,000 of an estate exceeding that sum is $750. This is not equal protection. The same may be said of other gradations provided for in the statute." This classification in the Ohio statute was made with reference to the amount received by the lineal descendants and not with reference to the collaterals or strangers, as in our statutes, and it will be noticed that in that statute, where the classification is made on the amount of money received, the $20,000 was exempt only with those persons who receive less than that amount. Those who receive more than $20,000 did not have any of it exempt. In this respect the reasoning of the Ohio statute does not apply to the

statute under discussion. The United States legacy laws have never had a division based upon the amount received except the act of 1862, which provided a small tax on the probates of wills and letters of administration. This law was never directly attacked in the courts as to this provision. New South Wales and Queensland have inheritance laws with a progressive tax very similar to the law under discussion. Max West, "The Inheritance Tax;" Studies in History, Economics and Public Law, Vol. 4, No. 2, pages 45, 46.

Mr. Justice Brewer says: "I was not aware until such examination of the extent to which in this country the matter of taxation on successions has advanced. I have often urged that as one of the most just of taxes, and, if it were graduated in proportion to the amount of property passing, I think it would be most beneficial." Dos Passos on Tax Inheritance Law, page 2, note 2.

The principle of graduation, as it is called—that is, the levying of a larger percentage on a larger sum, though its application to general taxes would be in my opinion objectionable—seems to me both just and expedient as applied to legacy and inheritance duties. Mill's Political Economy, Book 5, Chap. 11, Sec. 3; see also Max West, "The Inheritance Tax," *supra*, page 124.

It is plain that many writers on economic subjects think there are strong reasons for an income tax graded in proportion to the amount received, and that judges of high repute concur in this view. If the classification be based upon reason, I believe that under our constitution an inheritance tax could be levied, graded in proportion to the amount received by the beneficiaries. If this portion of the law that I am now discussing had been worded so that all beneficiaries should be taxed three per cent on the first $10,000 that they received, four per cent on the next $10,000, five per cent on the next $30,000 and six per cent on all in excess of that amount, I should feel strongly inclined to hold that the law was constitutional, even in the face of the Minnesota and Ohio decisions just referred to, and certainly a law drawn on reasonable lines graduating the taxes in proportion to the amount of property received by the beneficiaries, must be held constitutional, if the $20,000 exemption in the first class in this act be constitutional. Under the law as it was passed a person who

is entitled to a legacy of $10,001 is taxed $400.04 and will actually receive only $9,600.96, while a person who has a legacy of only $10,000 is taxed $300, and actually receives $9,700, or about $100 more than the person who, under the will was entitled to the larger legacy. Again, the person who receives more than $50,000 is taxed $600 on the first $50,000, while the person who received only $50,000 is taxed $500 on it. Is this reasonable? Is this, as the Ohio Supreme Court says, "equal protection"? Why should a man who has a right to receive $50,000 worth of property be only taxed $500, while a man who receives an estate exceeding $50,000 be taxed on an equal amount $500? If the persons who are to receive, under this part of the law, $10,000 or less, are considered as one class, and those who receive from $10,000 to $20,000 another class, and those who receive from $20,000 to $50,000 another class, and those who receive in excess of $50,000 another class, then it is true that each one of these four classes respectively is taxed uniformly as to the class upon which it operates, but is there any good reason for considering this a reasonable classification?

It may be urged with a great deal of force that this law is in contravention of section 2, article II of the constitution, which says that the fundamental rights of property and liberty cannot be taken without due process of law or the "law of the land." "The law of the land is the opposite of arbitrary, unequal and partial legislation. The legislature has no right to deprive one class of persons of privileges allowed to other persons under the same conditions" *Ritchie* v. *People*, 155 Ill. 105.

Again the Supreme Court has said in *Hardy* v. *People*, 160 Ill. 465, that "each person subject to the laws has a right that he shall be governed by general public rules. Laws and regulations entirely arbitrary in their character, singling out particular persons not distinguished from others in the community by any reason applicable to such persons, are not of that class. Distinctions in rights and privileges must be based upon some distinction or reason not applicable to others, and it is only when such distinctions exist that differentiate, in important particulars, persons or classes of persons from the body of the people, that laws having operation only on such particular persons or classes of persons have been held to be valid enactments." See also *Wunderle* v. *Wunderle*, 144 Ill. 40, 53.

Is there any distinction in rights and privileges that differentiate, in any important particulars, the persons who receive by will $20,000 and no more, from the class of persons who under this law receive by will $20,100? Is not a rule purely arbitrary that compels a person who receives more than $20,000 by will to pay four per cent on the first $20,000 that he receives, and a person who receives by will not to exceed $20,000 paying but three per cent? This classification into the $10,000 amounts, $20,000 amounts, and $50,000 amounts creates classes of persons who possess rights and privileges not allowed to other persons under the same conditions.

While it is the established doctrine of our courts that the taxing power of a State is absolute and uncontrolled, except so far as it is limited by constitutional provisions, yet this must be followed with some reservation, for in our government there is no such thing as unlimited power of taxation. Limitations of taxing power arise out of the essential nature of all free governments. Chief Justice Marshall has said that "the power to tax involves the power to destroy." The implied reservations of individual rights without which freedom could not exist are respected by all governments worthy of the name. "Every thing that may be done under the name of taxation is not necessarily a tax; and it may happen that an impressive burden imposed by the government, when it comes to be gravely scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property not warranted by any principle of constitutional government.

"In the second place, it is of the very essence of taxation that it be levied with equality and uniformity, and to the end that there should be some system of apportionment. Where the burden is common, there should be common contribution to discharge it. Taxation is the equivalent for the protection which the government affords to the persons and property of its citizens; and as all are like protected, so all alike should bear the burden, in proportion to the interests secured. * * * But whatever may be the basis of the taxation, the requirement that it shall be uniform is universal." Cooley's Constitutional Limitations, 6th Ed., 598, 607, 608, 615.

I am aware that it has often been said that perfect equality of taxation is unattainable. A mere approximate equality and uniformity is all that can be expected. Mere diversity in the methods of assessment and collection, if these methods

are provided by general laws, uniform as to the class upon which they operate, violates no general rule of right. As Mr. Justice Miller said in the *State Railroad Tax Cases*, 92 U. S. Rep. 612, on an appeal from an Illinois decision: "Perfect equality and perfect uniformity of taxation, as regards the individuals or corporations or the different classes of property subject to taxation, is a dream unrealized. It may be admitted that a system which most nearly attains this is the best, but the most complete system that can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, and of those who are not citizens in all the localities of a large State like Illinois, the application being made by men whose judgment and opinions must vary as they are affected by all the circumtances brought to bear upon each individual, the result must inevitably partake largely of the imperfections of human nature." *City of New Orleans* v. *Davidson et al.*, 30 La. Annual Rep. 554.

I fully agree with this reasoning. But any legislation with reference to taxation which does not tend toward equality or uniformity by approximation, at least, ought not to be sustained. Any enactment respecting taxation is not in conformity with this principle of it "directly and necessarily tends to disproportion the assessment." *Cheshire* v. *Commissioners*, 118 Mass. 386; *Ins. Co.* v. *Commissioners*, 133 Mass. 162.

If this arbitrary division, as laid down in this law is to be sustained, what is to hinder the enactment of a law dividing into classes, which has even less justification and reason than this? In my judgment this law tends directly and necessarily to disproportion in taxation.

I have heard the argument made that this statute may be void in part without rendering the whole statute void necessarily. I believe that the part of the statute which we have here under discussion is so closely connected, and a part of the entire law, that if it is void, the entire law must necessarily fail. "We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not." *U. S.* v. *Rees*, 92 U. S. 221.

It is a fundamental doctrine that the same statute may be in part constitutional and in part unconstitutional, and that

if the parts are wholly independent of each other that which is constitutional may stand, but that which is unconstitutional will be rejected.

"But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object without the aid of the invalid portion; and if they are so mutually connected with and dependent on each other, as conditions, considerations or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect the legislature would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, or must fall with them." *People* v. *Cooper*, 83 Ill. 595.

I am thoroughly satisfied that this section of the law which divides into classes in accordance with the amount of money received is so connected with the entire law as to make it impossible, if that section is stricken out, to give effect to what appears to have been the intent of the legislature.

Viewing the provisions of this law as to classification, as I have indicated, I have not thought it advisable to discuss any other portions of the act, though I may say in passing, that Dos Passos' criticism on the statute in his work on Inheritance Tax Law, page 24, that "it does not seem to have been carefully drafted with regard to legal phraseology, and for this and other reasons, may, unfortunately, be the source of much litigation," appears to me just.

Believing, as I do very strongly, in the fundamental idea of a tax inheritance law, and that when such a law is properly drawn it is one of the most satisfactory methods of taxation, it is with great reluctance that I have been forced to the conclusion that the classification attempted in this law causes unjust discrimination between persons, is arbitrary, unreasonable and not based upon sound principles of public policy, and that the law must be held unconstitutional.—*From the Chicago Legal News of November 28, 1896.*

Nos. 425, 463 & 464.

ILLINOIS INHERITANCE TAX CASES.

(Progressive taxation and arbitrary exemptions.)

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOSEPHINE C. DRAKE ET AL., Executors, &c., *Plaintiffs in Error*,
vs.
DANIEL H. KOCHERSPERGER, County Treasurer, &c., of Cook County, Illinois. — No. 425.

ELIZABETH EMERSON SAWYER ET AL., Executors, &c., *Plaintiffs in Error*,
vs.
THE SAME. — No. 463.

JESSIE NORTON TORRENCE MAGOUN, *Appellant*,
vs.
ILLINOIS TRUST AND SAVINGS BANK, as Executor, &c., of Joseph T. Torrence, deceased, and DANIEL H. KOCHERSPERGER, County Treasurer, &c. — No. 464.

ORAL ARGUMENTS BY MR. GUTHRIE AND MR. HARRISON ON BEHALF OF PLAINTIFFS IN ERROR AND APPELLANT IN SUPPORT OF THE CONTENTION THAT THE ILLINOIS INHERITANCE TAX LAW IS UNCONSTITUTIONAL BECAUSE IN CONFLICT WITH THE PROVISIONS OF THE FOURTEENTH AMENDMENT.

WASHINGTON, D. C., JANUARY 28, 1898.

BENJAMIN HARRISON,
WILLIAM D. GUTHRIE,
EUGENE E. PRUSSING,
Of Counsel for Plaintiffs in Error and Appellant.

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OPENING ARGUMENT BY MR. GUTHRIE.

MAY IT PLEASE THE COURT:

The questions in these cases arise under the fourteenth amendment, and involve the validity of an act of the legislature of Illinois, passed in 1895, commonly known as the Inheritance Tax Law of that state. The act divides into classes all persons succeeding to a decedent's property. It imposes upon those in one of these classes a progressive or gradu-

ated tax increasing from three to six per cent. according to value; and it grants to each person in another class an exemption of property worth twenty thousand dollars and also an exemption of estates for life or for a term of years, irrespective of value.

The constitutionality of the act is challenged upon the ground that it conflicts with the fourteenth amendment in that it imposes a tax which is arbitrary and unequal and according to no lawful system of classification, and therefore takes property without due process of law and denies to persons the equal protection of the laws.

The two principal points to be discussed are as to the power to grant arbitrary exemptions and as to the validity of a progressive inheritance tax graduated solely according to value or wealth. The general question in regard to the constitutionality of progressive taxation is becoming of great public interest; it concerns the people of every state; and it is now before this Court for its consideration and adjudication.

We shall contend on behalf of the plaintiffs in error in the first two cases and of the appellant in the third case that a law would be clearly unconstitutional which imposed a progressive tax upon property or individuals graduated solely according to value or wealth, or which granted large exemptions arbitrarily and for no sound reason of public policy; and that the same principles and rules should invalidate a law arbitrarily imposing a progressive tax upon estates of decedents or successions thereto and granting excessive exemptions. We shall contend also that our adversaries cannot maintain the extreme position they deem necessary to take in support of the act, that the power and control of the state

over the property of decedents is so absolute that it can wholly deny the right of inheritance or of testamentary disposition, and escheat or confiscate or arbitrarily dispose of such property at the will of the legislature; and we shall insist that even if the state has such absolute and despotic power in respect of decedents' property, then it must exercise the power impartially and by general and equal laws, and cannot discriminate against particular members of any class selected for taxation or regulation, and withhold from them rights which it grants to others freely and without tax.

The statute in question took effect in July, 1895, and since then has been the subject of litigation in the state courts. The Supreme Court of Illinois has held the law constitutional, reversing the judgment of the County Court of Cook County, which court had decided that the act was void because it violated the provision of the state constitution requiring taxation to be in proportion to the value of the property taxed or by general law "uniform as to the class upon which it operates." Somewhat similar legislation has been declared unconstitutional in other states—in Ohio, Wisconsin, Minnesota and New Hampshire—as obnoxious to the rule of equality.

The first case is Drake as executor against Kochersperger as treasurer of Cook County, Illinois, error to the Supreme Court of that state; and it presents, upon the point of jurisdiction, the doubtful question whether the judgment below sustaining the act is final within the meaning of the decisions of this Court, although nothing remains to be done thereunder except to calculate the amount of the tax and enforce it. The defence under the Constitution of the United States was specially pleaded in the court of original

jurisdiction. The second case is Sawyer as executor against the same, error to the Circuit Court of the United States for the Northern District of Illinois, and is an action which was originally brought in the state court and removed to the federal court. No diversity of citizenship exists. The ground of removal was that it appeared from the complaint, or petition as it is styled in Illinois, that the controversy arose under the Federal Constitution, in that the act was claimed to be in conflict with the fourteenth amendment and that no other than the federal question was involved; in other words, that the act would be defeated by one construction under the amendment or sustained by the opposite construction. No motion to remand was made below, and no point as to jurisdiction has been raised here by the state. The judgment of the United States Circuit Court overruled the defense that the act was unconstitutional under the fourteenth amendment. In the third suit, a bill in equity filed by Mrs. Magoun against the Illinois Trust and Savings Bank as executor of General Torrence and also against the County Treasurer, the jurisdiction is clear by reason of diverse citizenship. The complainant, who is the daughter of the testator and the principal legatee under his will, and who is liable as such for a tax of six thousand dollars, upon whose property the tax is a lien, and whose title it clouds, being a resident and citizen of New York, filed this bill in the United States Circuit Court at Chicago against citizens of Illinois to enjoin the trust company from paying the tax. The suit is one of equitable cognizance within repeated rulings of this Court and as held in one of the cases decided at this

term (*Ogden City* v. *Armstrong*, 168 U. S., 224). The court below sustained the demurrer to the bill, and the only question presented was as to the constitutionality of the law under the fourteenth amendment.

At this point, and before reciting the provisions of the act, it may be proper to state that we do not deny the power of the legislature to tax successions and inheritances and transfers by testamentary disposition. We admit that under the fourteenth amendment certain property or certain classes can be singled out for taxation even though this may result in exempting other property and other classes from any tax burden; that in the case of succession or inheritance taxes near relatives may be placed in one class and collateral or distant relatives and strangers in other classes, and that one class may be taxed and another class not taxed. But we do deny the power to grant excessive exemptions in any class and to impose progressive taxes varying in rate arbitrarily according to the amount of property or the wealth of the taxpayer or the value of a decedent's estate or the amount inherited. Our plea is that the power of taxation, so great and so liable to abuse, shall be exercised impartially and by equal laws, and that taxes shall be imposed proportionately upon all persons properly within the same class and owning like property or exercising like rights under substantially similar conditions. As Mr. Justice Matthews said: "the equal protection of the laws is a pledge of the protection of equal laws"—whether tax laws or any other laws.

This legislation is purely and simply a tax or revenue law, purporting, as its title and every provision declare, to

levy a tax on successions or inheritances. The law provides that the tax shall be upon property and be paid by the successor or legatee; it is to be deducted from the legacy or inheritance. That it is a tax as such upon the succession to property has been expressly held by the state court, and this is practically admitted in the defendants' brief.

These inheritance taxes are not based upon the power of the states to regulate descents and wills. They originated in probate duties, and were always regarded as tax or revenue measures. The federal inheritance or succession taxes during the Civil War were clearly not sustained upon the ground of any power to regulate successions to decedents' property, for Congress has no such power. The tax or excise or duty, whatever we choose to call it, was upheld as a legitimate exercise of the federal taxing power, and not upon any theory that Congress could deny the right of inheritance or of testamentary disposition and escheat or confiscate all the property of a decedent. We are, therefore, in the present case, considering nothing but a tax law and in no proper sense a statute regulating inheritance. If, however, it were not a tax, but an attempt on the part of the Illinois legislature to regulate the right to inherit or to succeed through testamentary disposition, granting it freely to those of moderate means and denying it on equal terms to those of larger means, we should then insist that the act would be clearly void, because unequal and based upon an arbitrary classification; and it would also be as clearly void if it were an attempt to force a redistribution or equalization of property under the pretense of taxation.

The Illinois Inheritance Tax Law, which is now before your Honors for consideration, divides persons inheriting or succeeding into three principal classes: in the first class are near relatives, parents, husband or wife, children, brothers and sisters, and adopted children; in the second class are collateral relatives, uncles, aunts, nephews and nieces, or any lineal descendant of the same; and in the third class are all other kin and legatees. This third class is said to be again classified or subdivided into four classes, and this subdivision is made according to the value of the decedent's estate, as we contend, or according to the amount or value inherited by each person, as our adversaries contend. The Illinois Supreme Court in the opinion in the *Drake* case says that "by this act of the legislature six classes of property are created, heretofore absolutely unknown, * * depending upon the estate owned by one dying possessed thereof." It was necessary for the court to hold that each variation in the progressive rate created or constituted a separate and distinct class of property for taxation in order to maintain even a colorable compliance with the provision of the Illinois constitution requiring taxation to be according to the value of property taxed or by general law "uniform as to the class upon which it operates."

The act provides in the first class for a tax of one per cent. on the amount inherited by each near relative. This class is granted an exemption of estates for life or for a term of years in real or personal property, and also an exemption to each successor or legatee of property worth twenty thousand dollars, wholly irrespective of the value of the estate of the decedent, the poverty or wealth of the

recipient, or the number of successors or legatees. The estate of a decedent may consist of property worth several hundred thousand dollars, but there is no tax if it be divided or parceled into estates for life or for a term of years and legacies of the value of twenty thousand dollars each. As Professor Gray points out in his work on Perpetuities, "a remainder after a term for years may not come into possession for centuries." The tax is imposed upon the remainder, to quote the exact language of the act, "after deducting therefrom the value of said life estate or term of years." If the estate for life or for years be bequeathed or devised to a near relative with remainder to a lineal, the estate is taxed; but if the remainder be to a collateral the estate for life or years is not taxed. If a man be devised or bequeathed a term of years, however long, he pays no tax; if he inherit a similar term of years, he must pay the tax. No wonder Dos Passos deplores the slovenly and arbitrary features of this act. How can we explain the discrimination resulting from taxing an estate for life or years if remainder be to a lineal, and exempting if the remainder be to a collateral or stranger, except upon the idea that the legislature was really seeking to force redistribution of property and to ordain that large estates should not remain in the same family beyond a life estate or term of years? If General Torrence, instead of devising the fee to his daughter, had left her a term of ninety-nine years or longer—a provision not at all unusual in Chicago, particularly in connection with the large hotels and office buildings there—the whole estate would have been

freed from the tax, for the remainder would have been of little value. The exemptions in this class may, therefore, attain enormous proportions. In the second class, comprising collateral relatives, the exemption is two thousand dollars to each successor. The amount is, of course, very much smaller than the exemption in the first class, and there is no exemption of estates for life or for a term of years; but the second class is numerous, and this exemption also might well represent large amounts. In the third class, small estates or legacies of less than five hundred dollars are exempted. I shall refer later to the grounds upon which reasonable and small exemptions have been sustained by the courts.

As to the third class of distant relatives and strangers, a question of great importance arises—whether progressive taxation can be permitted under the American system of equal laws. The tax in the third class is progressive or graduated. This class is said, as I have stated, to be again subdivided into four classes of property, depending solely upon value, or, to repeat the language of the Supreme Court of Illinois, "classes heretofore absolutely unknown, * * depending upon the estate owned by one dying possessed thereof." The rate in the third class is three per cent. on all successions in estates of ten thousand dollars and less, four per cent. in estates over ten thousand and not exceeding twenty thousand dollars, five per cent. in estates between twenty thousand and fifty thousand dollars, and six per cent. in estates over fifty thousand dollars.

In order to illustrate the operation and effect of the progressive tax in this Illinois act and to show its arbitrary

features, a few practical examples may be stated under both aspects—whether the rate depends upon the value of the estate or upon the amount inherited. Taking the view that the rate of the tax in the third class depends upon the value of the decedent's estate, let us assume that A is entitled to a succession of $5,000 out of an estate of $10,000, and that B is also entitled to a similar succession of $5,000, but out of an estate of $51,000. A pays three per cent. or $150; but B must pay six per cent. or $300 for the right to receive exactly the same sum; in other words, B pays double the tax for exercising the identical privilege or right of succession to the same amount simply because the estate out of which his legacy is payable happens to be more valuable. Or let us suppose two estates: one of $10,000 passing to one legatee and another of $60,000 passing to six legatees who receive $10,000 each. In both instances, each taxpayer or legatee is entitled to receive $10,000; that is the extent or value to him of the so-called privilege or right of succession. In the one case, the legatee pays a tax of three per cent. or $300; in the other, he pays a tax of six per cent. or $600, double, on receiving exactly the same legacy. This is the method throughout the whole class.

The progression is likewise unjustly and oppressively arbitrary if we take the view, as contended by the defendant, that the rate of the tax in the third class is based upon the amount or value received by the successor, which, it seems to us, is not the true interpretation of the statute. If the rate in this class does depend upon the amount or value inherited by each

person taxed, then we submit that the act comes within the language of Mr. Justice BREWER in the *Gulf, Colorado and Santa Fé* case, decided at the last term, where he said: "Yet it is equally true that such classification cannot be made arbitrarily. The state * * may not say that all men of a certain age shall be alone thus subjected, *or all men possessed of a certain wealth.* These are distinctions which do not furnish any proper basis for the attempted classification." Under the assumption that the rate of the tax in the case at bar depends upon the amount inherited, the tax is, nevertheless, arbitrarily imposed so as to result in unnecessary inequality. Thus, one who is entitled to receive a legacy of $10,000 pays three per cent. or $300; while one entitled to a legacy of $10,001 pays four per cent. on the whole amount, or $400.04—that is to say, $100 more tax for succeeding to the extra dollar. This runs through the whole class. The accidental addition of one dollar, or of a few cents, to a legacy or inheritance, may make a difference of several hundred dollars in the tax. For example, A may inherit $50,000, on which the tax is five per cent. or $2,500; while B inherits $50,001, on which the tax is six per cent. or $3,000.06. B is therefore taxed $500.06 in excess of A because he inherits one dollar more.

Many of the arbitrary features of this act could easily have been avoided by omitting the exemptions in the first class and by imposing the tax in the third class equally according to the amount actually received; for example, three per cent. on the first ten thousand dollars, four per cent. on the second ten thousand, and so on, as was the rule

adopted in the federal income tax. If progressive taxes are to be allowed, let us at least have reasonable provisions, drawn on lines approximating to some fair rule of equality. The Supreme Court of Colorado, in speaking of this particular act, said that "the statute of the State of Illinois * * is one of the most objectionable acts upon the subject to be found."

The principal provisions of the act are now before the Court. They are contained in the first two sections. The remaining sections relate to the machinery of collection.

Mr. Justice BROWN. Let me interrupt you right here, Mr. Guthrie. In the cases you have cited from other states, holding similar laws to be unconstitutional, did the courts have reference to the federal constitution or to the provisions of state constitutions?

Mr. GUTHRIE. In no case except in Ohio was reference made to the federal constitution. In Ohio the Supreme Court of that state said that the provision of the state constitution was the equivalent of the guarantees contained in the fourteenth amendment. They said that the provision of the Ohio constitution requiring uniformity was as broad as the provision of the fourteenth amendment. In the other cases, they proceeded upon provisions requiring equality or uniformity in taxation.

The rule of our past has been equal and proportional taxation—namely, taxing all property or fortunes on the same rate of computation. That is the constitutional rule in Illinois, and this act could only be sustained by holding that for purposes of taxation separate classes of the same property could be created depending solely upon value and taxed at different rates.

The least reflection must convince us that, where the principle of proportional or equal taxation is abandoned, no definite rule remains. As Mr. Lecky has said in his "Democracy and Liberty": "At what point the higher scale is to begin, or to what degree it is to be raised, depends wholly on the policy of governments and the balance of parties. The ascending scale may at first be very moderate, but it may at any time, when fresh taxes are required, be made more severe, till it reaches or approaches the point of confiscation. No fixed line or amount of graduation can be maintained upon principle, or with any chance of finality. * * Graduated taxation is certain to be contagious, and it is certain not to rest within the limits that its originators desired." Even those who favor progressive taxes on inheritances frankly warn us to be cautious in advocating or attempting any general application of the principle, and confess that the objections to progression in this country may be insuperable if we give heed to the dangers it threatens.

In our briefs we have quoted from historians and writers, not with any idea that the Court is to embark on the shoreless sea of economic theories and speculations, but simply to show the true nature and tendency of progressive taxation, and that it cannot be other than arbitrary; that is to say, that there is no rule or principle yet discovered by which to control or prevent the severest rate or, indeed, spoliation. These extracts will, we believe, persuade the Court that great dangers lurk in progressive taxation and that it contains the germs of confiscation. The maximum to-day in Illinois is only six per cent., and, if it could be adjudged that this is

the limit, our clients would cheerfully pay the tax; but the maximum may be increased to fifteen or fifty per cent. to-morrow. The New York legislature voted last year for a maximum of fifteen per cent. on large estates; and the act had to be vetoed by the Governor. We are contesting here not the particular rate, but the beginning of a vicious system which may end in confiscation and ruin.

The *rate* of taxation upon selected subjects or classes is, of course, in the discretion of the legislature. If legislatures are compelled to impose equal taxes on all, we have a sufficient protection and safeguard against abuse by the majority in a country like ours where property is generally distributed. If the legislatures are free to impose progressive taxes, the security of property is gone. Concede the principle of progression, and there is no limit to the injustice a legislature may commit upon the minority. We must invoke the maxim—the only safe rule of conduct—*obsta principiis.*

The grounds upon which this act has been sustained and is sought to be defended may now be mentioned.

It is not claimed that in regard to property, in the hands of living owners, progressive taxation or excessive exemptions to individuals would be constitutional under the fourteenth amendment; but it is contended that a different rule may be applied in the imposition of taxes on inheritances or successions from that which must be observed in taxing property. The contention is that the right to inherit and the power to dispose by will are the creatures of statute law, depend solely upon it for exist-

ence, and are but the favor or license of the legislative branch of the state government to be withheld or granted in its discretion, and upon such terms and conditions, arbitrary or otherwise, as it sees fit. This is the extreme argument considered necessary by the state in order to sustain the exemptions and progressive features of this act of the Illinois legislature.

The ground taken by our adversaries, as stated in their brief, is that the legislature has the absolute power of control over the property of a decedent and may declare that it shall not pass, either by his will or to any person or class of persons by descent, but shall escheat to the state. Their position is that as, in their view, the legislature may reserve or take all, it may reserve or take part and impose any terms it sees fit, arbitrary or otherwise, upon granting or bestowing the remainder. They argue that, as this right of inheritance or testamentary disposition has in the past been regulated by statute, it may be denied or destroyed by statute, because statutory law created it. If the right of inheritance or testamentary disposition may be denied because heretofore regulated by statute, would not the same argument apply to innumerable rights of persons and even to the title to property itself? From the very beginning with us in this country, and particularly in the Northwest Territory, the title to lands has been regulated by statute and derived from it. Could the legislatures repeal such statutes and transform all property into mere estates for life, escheating to the state on the death of an owner?

We may pause a moment in the line of

argument to remark that even if the state be assumed to be the natural successor to a decedent's property—that its intestate laws and statutes of wills are acts of grace—that it can deny the right of inheritance or testamentary disposition and cause to escheat all property on the death of the owner, the Illinois act before the Court is nevertheless repugnant to the fourteenth amendment.

Mr. Justice GRAY: Going back a moment to your last point, Mr. Guthrie: How far would you be willing to admit that the legislature could change the course of inheritance?

Mr. GUTHRIE: Within reasonable lines. This power of regulation has always been exercised in this country and in England.

Mr. Justice GRAY: You would not, for instance, say that the law of descent would be void as applied to persons now living, who die hereafter?

Mr. GUTHRIE: Not at all. There is no vested right in that particular.

Mr. Justice GRAY: You would not suggest there was any imperfection in a law which provided that a living man shall not give away more than the half of his property to his wife, though he had before the right to will away the whole?

Mr. GUTHRIE: Not at all. These are all reasonable regulations to be prescribed according to the policy of the particular state. But we do contend that if the legislature should pass an act providing that a man should not leave his property to his wife or to his child, but that it should wholly escheat to the state for the benefit of the com-

munity at large, that would be so arbitrary an exercise of power that it would be unconstitutional and void. Regulation is one thing; confiscation, quite a different proposition.

Mr. Justice BROWN: In many continental countries, the power of testamentary disposition does not extend beyond half the estate, I believe?

Mr. GUTHRIE: In Holland, in France and in a number of the continental countries, the power of disposition is said to be limited by the superior right of children to inherit; but it varies in all countries. We find in some countries a policy that there shall be absolute inheritance—that parents shall not disinherit their children; while in other countries we find more and more absolute powers of ownership given to the possessor or to the living person as may be required by the public policy. But everywhere, in every country, in every state, we find either absolute testamentary power or the right of children to inherit.

Mr. Justice HARLAN: What do you say about the power of the legislature to prevent the disinheriting of a child?

Mr. GUTHRIE: It would have that power, without question, and it would be a valid limitation upon the testamentary power. It would be but a recognition of the natural right of children to inherit and the natural duty of parents.

If your Honors please, I was about to say, that even if this absolute and despotic power as to a decedents' property exist, even to the full extent claimed by the other side, we

contend that this right of succession as long as it exists, as long as it is granted to anybody, rich or poor, is a property right of pecuniary value and must be granted impartially and by general laws: it cannot be granted to those of moderate means and denied wholly or partially to those of larger means. The acts of grace of a state are not like the gifts of a private person, or of an irresponsible despotic sovereign who bestows according to his fancy. They are solemn laws which must affect impartially and equally all persons within their purview. The power of a state to prescribe rules for the devolution of property does not eliminate or diminish the necessity for equal laws. Those who legislate must be made to appreciate, as LOCKE said in his Civil Government, that laws are "not to be varied in particular cases, but ought to have one rule for the rich and poor, for the favorite at court and the countryman at the plough." Judge COOLEY says (Const. Lim., p. 484): "To forbid an individual or a class the right to acquisition or enjoyment of property in such manner as should be permitted to the community at large, would be to deprive them of *liberty* in particulars of primary importance to their 'pursuit of happiness.'" The Supreme Court of Illinois in its opinion in the *Drake* case refers very properly to the "right of succession." This *right*, whatever its origin and character, is a property right of immense value, and, while unrevoked, all rich or poor are entitled to enjoy it impartially under "the equal protection of the laws." Special privileges cannot be granted under any pretense or any form of class legislation in any state of the Union.

I may also here read to your Honors what the Supreme Judicial Court of Massachusetts has said upon the point of the power of the state to escheat all property. It was in the case of *Minot* v. *Winthrop* (162 Mass., 113). Chief Justice FIELD in the opinion of the court, as quoted on page 27 of our brief, and speaking of this alleged absolute power said: "We have no occasion in these cases to consider whether the legislature has the power to make the Commonwealth the universal legatee or successor of all the property of all its inhabitants when they die, for the purposes not only of paying the public charges, but also of distributing the property according to its will among the living inhabitants, or for the purpose of abolishing private property altogether. We assume that under the Constitution this cannot be done, either directly or indirectly; that the legislature cannot so far restrict the right to transmit property by will or by descent as to amount to an appropriation of property generally; that it cannot impose a tax which shall be equivalent, or almost equivalent, to the value of the property, and cannot so limit the persons who can take as heirs, devisees, distributees or legatees that the great mass of all the property of the inhabitants must become vested in the Commonwealth by escheat. The state can take property by taxation only for the public service, and we assume that its right to take property, if any exists, by regulating the distribution of it on the death of the owner, is limited in the same manner, and that this right must be exercised in a reasonable way."

Now, it may be conceded that the principles of classification which this Court has declared in expounding the fourteenth amendment do not inhibit a state from placing the property of decedents, or rights of succession thereto, in a distinct class for purposes of taxation. Having drawn a line between transfers of property *inter vivos* and successions after death, the state may subject the latter to further classification in respect of successors. Thus, aliens may be singled out for special burdens, or excluded altogether, distinctions may be drawn between relatives and strangers, and relatives may be classified according to their degrees of kinship to the decedent. All these classes are definable with regard to relative differences and existing distinctions; they are not arbitrary, and different rates may be imposed upon property passing to each without necessarily denying to successors the equal protection of the laws. If the classification rests upon an intelligible and reasonable foundation, it will be upheld when all in each class thus selected are equally taxed or equally exempted.

The state may reasonably regulate the right of devise and bequest just as it may regulate the transfer or the holding of real or personal property, but the power to regulate cannot involve the power to escheat or confiscate property. The state may designate heirs in case of intestacy, grant full testamentary power, exclude aliens, confer rights of curtesy and dower, forbid perpetuities, safeguard creditors, declare want of capacity in infants or insane persons, and otherwise regulate the holding or disposition of property according to its policy; but this general power of the state to regulate does not confer legisla-

tive power to convert such property to public use without compensation upon the death of the owner in disregard of the claims of child or widow. Frequent sanction by legislative enactment of the right of inheritance or testamentary disposition is entirely consistent with the claim that these rights are natural or fundamental rights which, under our system, the states are bound to recognize in one form or another. The state may regulate successions to property as it can declare that aliens shall not hold property within its borders, and the manner, the form, the method of transfers *inter vivos*. Yet, no one would take the position that this power of regulation—for example, as to the conveyance of land or the exclusion of aliens or corporations—would enable the state to pass a law prohibiting all sales and dispositions of real property, or unreasonably and arbitrarily limiting the use of property. If a state should attempt to impose arbitrary regulations previously unknown, the power would have to be denied. A deed may have to be under seal, with certain formalities, accompanied by the payment of a stamp tax or duty and other reasonable requirements; all this is regulation. But unreasonably and arbitrarily to limit the use of property or to restrain transfers even to resident citizens would be quite a different thing. It would be confiscation or spoliation and not regulation. It would be depriving a man of property without due process of law. It would not be legitimate legislation.

The consideration of this general question of legislative power over successions presents two different aspects,

which should be briefly noticed: the one, as to the right of inheritance; the other, as to the power of a testator to devise or bequeath his property. These points will be discussed more at length by Mr. Harrison.

The right of inheritance, although regulated by statute for hundreds of years, is not the creation of statute law. It existed among the Anglo-Saxons, and it prevailed in England long before the Conquest. It was recognized and perpetuated in the great charters of English liberty. By legal historians, it is treated as "our common law of inheritance." It was a customary right prior to any statute of which we have record. As Mr. Justice BROWN said in a recent case in this Court: "The general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents." In the latest authoritative history of English law, by Pollock and Maitland, the authors say that, "in calling to our aid a law of intestate succession, we are not invoking a modern force," and that "the time when no such law existed is in strictest sense a prehistoric time." This right of inheritance was recognized in the ordinance of 1787 for the government of the Northwest Territory, and ever since has been embodied in the laws of Illinois. It was a right established in every one of the thirteen original states at the time the government was founded. It had existed in the colonies and for centuries before in England, and has always been exercised and enjoyed by our race. It was deemed a right by the Romans in the Twelve Tables. It was a right with the Egyptians. We find it everywhere in the Mosaic law, and a distin-

guished writer holds it to be the general direction of Providence. As Chancellor KENT said, "nature and policy have equally concurred to introduce and maintain this primary rule of inheritance in the laws and usages of all civilized nations." The right of children to inherit in the case of intestacy is recognized in every state and always has been.

The power to devise or bequeath property at will developed as a limitation upon the right of inheritance, and in order to prevent escheat for want of heirs, and as the progress of society or the policy of a country demanded more and more absolute powers of ownership. However evidenced—whether in statute or in the old customs and the practice of *post obit* gifts—the power has been recognized as an incident of the right of property—as a natural right—from time immemorial, and has been considered a common-law right in America. It originated in custom long before the period of Norman rule. It was practised for centuries before the Battle of Hastings, both in Normandy and in England; it was deemed a disgrace to die intestate, for that implied death without absolution; the priest always witnessed the *post obit* gift. Blackstone said that "in England this power of bequeathing is coeval with the first rudiments of the law, for we have no traces or memorials of any time when it did not exist."

The position of our adversaries is that a state legislature has absolute power to deny the right of inheritance and of testamentary disposition, and escheat whatever private property a man may have accumulated as a result of a life's labor or a life's economy. That such a policy—

that the possibility of the exercise of such a power—would take away all incentive to labor, shake society to its very foundations, and destroy our civilization, cannot be doubted for a moment. Is there such legislative power in any of the United States? Can it be asserted that the legislatures of the states can deprive us of rights which have been recognized and enjoyed by our race for centuries before this continent was discovered? There is not a civilized—if, indeed, there be a barbarous—state in the world to-day, that does not recognize the rights of inheritance and of testamentary disposition. The dying Indian can dispose of what he has accumulated. The savage, all over the world, instinctively considers it a natural right at death to dispose of his property. It is a right exercised everywhere, subject only to the limitation which we all recognize and concede—that the government may step in on grounds of public policy and ordain that natural heirs shall not be disinherited, or that property shall not pass to aliens, or to foreign corporations, or to such corporations as it deems should not be allowed to hold or accumulate property. The state in making such regulations derives its power not from the idea that the property escheats and belongs of right to it on the death of the decedent, nor from any notion that the ownership is in the state, but from that *suprema lex* which justifies every society in reasonably protecting itself according to its public policy—a power it may exercise as to the property of the living as well as of the dead.

We confidently assert that, under our system of constitutional government, no legislature has the arbitrary and absolute power to deny all right of inheritance

or all power of testamentary disposition. Nor have any of the cases cited by the defendant held that there was any such despotic power, although expressions to that effect, *obiter* and speculative, are to be found. These expressions depend upon erroneous assumptions and were made without investigation. No state ever attempted to exercise such a power, nor did Parliament in its most despotic period; and no court in this country has ever decided that any such arbitrary power existed, for no such point was necessarily involved. The defendant urges that we are unable to show any authority adjudging that inheritance and testamentary disposition are natural and fundamental rights which the legislatures cannot deny, and that we can only cite historians of the law. The reason is obvious: no state ever attempted to deny the right. To quote the language of Mr. Justice Patterson one hundred years ago (in *Vanhorne's Lessee* v. *Dorrance*, 2 Dall., 304, 310): "Such an act would be a monster in legislation, and shock all mankind."

Two cases in this Court are cited by the defendant as establishing the doctrine that a state can wholly deny the right to inherit or to transfer by last will and testament; but they sustain no such proposition.

The first case, decided in 1850, is *Mager* v. *Grima*, (8 How., 490, 493–4), where the Court sustained a law of the State of Louisiana imposing a tax on alien heirs or legatees. Chief-Justice TANEY, delivering the opinion of the Court, said that "every state or nation may unquestionably refuse to allow an *alien* to take either real or personal property, situated within its limits, either as heir or legatee, and

may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the States of this Union at this day, real property devised to an *alien* is liable to escheat. And, if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy." The second case is *United States* v. *Perkins* (163 U. S., 625, 628), in which the Court held that personal property bequeathed to the United States was subject to the New York inheritance tax, and that the state had a right to impose a tax upon the transfer or succession of any property.

It must be evident that there is nothing in these cases tending to sustain any such extreme position as that the state may wholly deny to our own citizens the right of inheritance or of testamentary disposition and escheat all property on the death of its owner. No such question was before the Court, and no such point was decided. Of course, the Court proceeded on no such ground when it sustained the federal inheritance tax in *Scholey* v. *Rew* (23 Wall., 331), for no one has ever claimed that Congress could regulate inheritances or deny the right of testamentary disposition.

Returning now to the consideration of the exemptions in the first class, we may repeat that this Illinois tax law grants to each near relative an exemption from the tax of estates for life or for a term of years, and of property worth twenty thousand dollars. Estates for life or for a term of

years in real or personal property may be of immense value and represent enormous incomes, but they are wholly exempted if passing to any members of this class. The exempted class includes all near relatives, parents, husband or wife, children, brothers and sisters and adopted children, and is consequently numerous. An exemption of property worth many hundred thousand dollars would not be unusual; and any testator may avert the tax by dividing his property into estates for life or for years and legacies of twenty thousand dollars.

The power of the state legislatures to grant reasonable exemptions to individuals need not be questioned, nor the power to grant exemption to corporations which more or less serve some public purpose. Reasonable exemptions have been upheld in some cases on the ground that the expense of collection would exceed the amount collected, and in other cases as relieving the very poor and needy from the burdens of government. Desty, in his work on Taxation, said that the only justification for such exemptions is the public policy which seeks "to enable the poor man not yet a pauper to escape becoming a public burden." As one of the leading cases states the rule: "Exemption from taxation should be based only on a well-grounded public policy, by which all share in the benefits."

Exemptions of lineals and other next of kin of the first blood will be found in the legislation of many states, and this distinction between lineals and collaterals or distant relatives and strangers has been sustained as a reasonable and justifiable classification. If the Illinois statute had taxed only collateral or distant

relatives and strangers and exempted the whole class of near relatives, the classification or exemption might have been proper. But our point is that, having selected near relatives as one class for taxation, the entire class must be taxed proportionately; that one cannot be taxed and another exempted in the same class; that children inheriting twenty thousand dollars and estates for life or for years cannot be exempted while those inheriting the fee or more than twenty thousand dollars are taxed. Exemption from taxation is but a form of class legislation, although it is called classification. Its legality is capable of being tested by the standard of reasonableness; in substance, it involves placing the exempted in a specially favored class. The legislature may define classes of property or individuals that actually exist, but it cannot create them; it cannot classify individuals as such; it cannot classify the same property or subjects simply according to value for taxation at different rates. Although the power to exempt has been said to be of legislative discretion, yet its exercise cannot, of course, be arbitrary. It must be reasonable and impartial, and grant to all similarly situated the same rights. Within the decisions of this Court in analogous cases, an exemption "cannot be sustained when special, partial and arbitrary."

A tax law which contains arbitrary exemptions could not be termed equal in any sense. All exemptions necessarily tend to increase the taxes to be levied on the non-exempted. If in Illinois all property owners could be allowed an exemption in ordinary taxes of property worth twenty thousand dollars or estates for life or for years, it would free from taxation the greater part of

the taxable property of the state, and of necessity impose a much heavier burden on the non-exempted. If inheritances of twenty thousand dollars can be exempted, so may inheritances of fifty or one hundred thousand dollars; and a very high and unjust rate must then be imposed on those not equally favored with exemption.

The advocates of this exemption seem to argue that, as as we concede that the whole class of direct heirs might have been practically exempted by not being taxed at all, the greater includes the less, and that therefore any exemption to them, however unreasonable and unnecessary, is within the discretion of the legislature. Such an argument would justify the grossest and most arbitrary exemptions, under any form of taxation, upon property or otherwise. The same reasoning, if sound, would uphold an exemption of twenty or fifty thousand dollars or more to all owners of any class of property. The proposition refutes itself.

It is important that the Court should appreciate that these exemptions exceed in amount anything heretofore known in this country under any form of taxation, so far as we have been able to ascertain. The highest exemption contained in the inheritance tax of any state is ten thousand dollars in Massachusetts and in New York, based in each case upon the value of the decedent's estate and not upon the amount passing to each legatee. Elsewhere the exemption is smaller and is based upon the value of the decedent's estate. In all states except Illinois and California, the exemption is fixed, definite and certain, depending upon the value of the estate; and, when these small estates are distributed, the recipients may be

entitled to a mere trifle. In California, it is of legacies or inheritances of $500. But, in Illinois, the $20,000 exemption is a minimum; the maximum may be several hundred thousand dollars, depending upon the number of legatees and the creation of estates for life or for years.

If your Honors please, what just or legitimate reason can there be for exempting, if life estates and estates for a term of years be given, and yet taxing, if the fee or the principal be inherited? Estates for long terms of years are being constantly created in Chicago; they are of immense value, and ordinarily the remainder or reversion is of little value. Mrs. Magoun, the appellant, is devised the fee or principal, and must pay a tax of six thousand dollars; she would pay no tax if she had been devised a term for ninety-nine years, although just as valuable as the fee. Is it not arbitrary and capricious to thus distribute the burden of taxation? What excuse or reasonable ground is there for any such exemption? What public policy prompts it? What was the moving cause? We can conceive of nothing except the intention to favor some particular individuals who desired to escape the tax by the creation of estates for life or for years.

It may be suggested that there is no inequality or discrimination in the Illinois act because the same exemption is granted to each person, rich or poor, and all alike can circumvent the act and throw off the tax by the creation of estates for life or for a term of years. This argument would sustain an act, for example, which exempted from a property tax farms or other property of the value of twenty or fifty or one hundred thousand dollars and imposed all the burdens of government and taxation upon those

who owned more valuable property, because the exemption was allowed to all and consequently was equal. The result would be that the whole burden of the taxes at confiscatory rates would have to be imposed upon the few rich. Perhaps, it sounds plausible to argue that there is no discrimination, no inequality, if the same exemption or the same privilege of circumvention be allowed to all alike; but this Court can find no difficulty in exploding so fallacious a proposition. Such a tax law is but a pretense of equality; it lacks the essence of legitimate legislation. If exemptions can be sustained on any such ground, when the true intention and motive and purpose of the legislature are obviously to exempt the majority of property owners, and to enable the law-makers to single out the few rich for the benefit of the many; if exemptions can thus be granted and all property owners of moderate means relieved of taxation and the whole burden of government thrown on the rich,—then there is no real security for property and the pledge of the protection of equal laws is empty and delusive. We should be as much at the mercy of legislatures and would suffer as bitterly therefrom as France suffered from her National Assembly when, during the Revolution, it practically taxed at one hundred per cent. what they were pleased to call the "superfluous."

But we are told that we concede the power of the state legislatures to grant reasonable exemptions, and we are asked: "Where do you draw the line?" We draw it on the hither side of the unnecessary and unreasonable and arbitrary. Show this Court an exemption to individuals which is not based on some sound and reasonable ground of

public policy, and we affirm that it will be annulled. The Court held that legislatures might regulate the charges of railroads and warehousemen and others, and the claim was at once set up that, having legislative power and discretion to regulate, the legislatures had absolute power and were untrammeled by interference of the federal courts under the federal charter of liberties. "Where do you draw the line?" was asked then, and this Court answered that the power to regulate could not be unreasonably and arbitrarily exercised and did not involve the power to confiscate. As Mr. Justice McKENNA said in the suit against the *California Board of Railroad Commissioners* (78 Fed. Rep., 236, 257): "The power of the state stops at injustice." It was claimed that the exercise of the police power was in the discretion of the legislatures. That was conceded, but the answer, in the ever-to-be-remembered language of Mr. Justice HARLAN, was that "there are, of necessity, limits beyond which legislation cannot rightfully go. * * The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

I may add a word here as to the power of taxation. A legislature, for example, may properly impose a tax upon the transfer of real estate, usually called a stamp duty, although essentially an excise tax, but it could not withhold from the owner of real property the right or power to convey it. A legislature may impose a tax upon all checks, as the

Federal Government did for many years, but it could never have been conceived that any legislature, or that Congress, had the power to deny to the people the right to pay their debts by means of checks. A legislature may impose a tax upon the sale of any kind of personal property or upon the sale of stocks or grain or anything else, but its right to tax in these cases is not based in any sense upon the theory that it has the power to confiscate or to deny the right of sale, which is a part of property itself. A state legislature or Congress may impose a stamp tax upon the publication of newspapers or magazines or books, but its authority to do so does not originate in any sense in a power to prevent publication. All this is regulation and legitimate taxation, but does not involve the power to arbitrarily destroy.

The defendant's brief refers to the fact that England and other nations have adopted the progressive principle as to inheritance taxes. Surely, it can hardly be necessary to recall that ours is the only government founded upon the principle of equality and a written constitution guaranteeing fundamental rights and distributive justice and securing to every "person within its jurisdiction the equal protection of the laws." We are not living under a system of English parliamentary rule, unchecked and unrestrained by constitutional limitations. One hundred and five years ago Mr. Justice WILSON, in *Chisolm* v. *Georgia* (2 Dallas, 419, 462), compared our form of government with the British and showed that the latter was but a despotism of Parliament, and Mr. Justice MILLER in *United States* v. *Lee* (106 U. S., 196, 208), ninety years later, again set forth the vast difference in the essential character of the two systems of government.

In support of progressive taxes, it is sometimes argued that the federal income tax during the Civil War was graduated. There is, perhaps, a difference in principle between a progressive tax on the income of individuals or corporations and a similar tax on their property or principal The writers on economics seem to think so. The one tax takes part of the income according to the so-called faculty doctrine of the theorists; the other diminishes the principal. An excessive income tax during any period of great necessity would still leave the principal intact; an excessive property tax may despoil and ruin. At any rate, the federal succession or inheritance taxes were not progressive or graduated as stated in the defendant's brief, although the degrees of relationship were classified and taxed at different rates, and the income tax, though progressive, had no such arbitrary and unjust features as we find in the Illinois act. But as Chief Justice CHASE said of war measures: "The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, it found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent."

There is a scheme of public policy inspiring this legislation, a motive prompting these exemptions and this beginning of progressive taxation. Certain writers and philosophers, as well as the socialists, are not at all satisfied with the distribution of weath as they find it in the world to-day. They would remodel society, level fortunes, limit acquisitions, redistribute wealth.

They argue that this should be done by limiting inheritances and testamentary dispositions. Chancellor Kent refuted these writers in some of his eloquent passages, and showed that human society would be in a most unnatural and miserable condition if it were possible to be instituted or reorganized upon the basis of such speculations, and that as long as society is constituted as it is the right of acquisition and of property ought to be sacredly protected. A few years ago an act was introduced in the Illinois legislature limiting the amount any person could inherit even from a parent, and forfeiting or escheating the surplus to the state; but the attempt then failed. Or was it only postponed?

Nor is redistribution of wealth or equalization of property a legitimate consideration of public policy in any form of tax laws. Twenty-two years ago, in the famous seed case, Mr. Justice BREWER, speaking from the bench of the Supreme Court of Kansas (*State* v. *Osawkee Township*, 14 Kans., 418, 422), said, in language so applicable to the present discussion: "Such taxation would be simply an attempt on the part of the state to equalize the property of its citizens. * * The mere mention of these questions suggests the dangers which would follow the adoption of this as a rule of public conduct."

If the state can as to decedents' property reserve to itself or confiscate the surplus over a fixed amount, what must it do with the property so reserved or confiscated? Must it redistribute the property; or may it accumulate so as in time to become the universal owner of all property? The history of every country has proved that no better device could be imagined for checking

industrial progress than any such policy of veiled confiscation tending toward state ownership. As Nicholson admonishes us in his book on "Historical Progress and Socialism": "It would introduce a creeping paralysis; and, when the time was considered ripe for taking over the land and capital, the land would be a wilderness and the capital old iron."

I have now stated generally the questions to be considered and the grounds upon which we urge that this act of the legislature of Illinois shall be declared unconstitutional. The decision for which we plead will not tend to lessen the taxing powers of the State of Illinois or to cripple or embarrass it in the collection of needed revenue. The act can be remodeled upon a fair and reasonable basis of classification. The legislature will be left free to impose succession or inheritance taxes at any rate found necessary for the requirements of government. The only limitation upon its power will be a compliance with the just and wise rule of the fourteenth amendment, which was intended to nationalize on a permanent basis the American doctrine and ideal of equality—equality of burdens as well as equality of rights and duties—and to place it forever beyond the temptation or the power of the states to deny to the lowliest or the richest the blessing and the protection of equal laws.

Closing Argument by Mr. Harrison.

May it please your Honors:

Before addressing myself to the line of argument which I have marked out, it may not be inappropriate to make a reference to the suggestion of the Attorney-General of Illinois—that this law might be held by this Court to be unconstitutional as to the third class, and sustained as to the other classes. We have in this law what was evidently intended to be a system of succession or inheritance taxation. This is one of several classes that the law defines and upon which it levies taxes. It is the class, if your Honors please, least favored; the unfavored class in this legislation; a class described as "all others," after the two classifications that embrace kinship to very remote limits. It is mostly the stranger who is taxed by this clause. Surely the learned Attorney-General would not ask this Honorable Court to conclude that the legislature of his State would desire that the residue of the statute should be maintained if this part were to be declared unconstitutional. Surely he would not be willing or have us believe that the legislature would have been willing that the unfavored class—the class the legislature was most anxious to tax and to tax most heavily—should escape, while the children and nearer relatives of the decedent are held to be subject to the operation of this law.

There is another feature of the law which, I think I would be justified in saying, after listening to these arguments and reading these briefs, is confessed by counsel to be unconstitutional. There is a feature of it that is not supported by any argument or by any citation which these gentlemen have presented to the Court. They have entirely failed to inform the Court either in the brief or in the oral argument, of the fact that this tax is levied upon gifts and conveyances *inter vivos*, if they are made in contemplation of death or to take effect after death.

MR. MORAN: They are testamentary in character—

MR. HARRISON: Testamentary in character! Does this honorable gentleman contend that, when one is in life and in the full possession of his faculties, he has no natural right to endow a child by an executed gift or conveyance, taking effect immediately, in contemplation of his own approaching death, but that that act is to be rated and put upon the same plane with the gifts by will of which he has spoken? I know it has been a part of almost every law taxing successions that gifts made in contemplation of death are included. Because otherwise such a law could not be executed. But, does Mr. Moran contend that, being in life and in the full possession of one's mental powers and in the full control of one's property one may not in contemplation of his death take from his safe a package of bonds and hand them to a friend in trust for the maintenance of a minor child, for whose support his estate has been chargeable, upon the ground that the child has no natural right to such support? I understood that counsel, in response to a question of the Court, admitted that the power of the owner over property during

life was absolute. If this be true—and it is plainly true—where is there any authority, where is there any suggestion to be drawn from history or from legal principles, that would put any limitation upon the power of one who is nearing the limit of human life to make provision, by a division of his property, for those whom nature has made dependent upon him? How does the doctrine of a "bonus" for a privilege, as my friend puts it, apply in such a case as that? No right is exercised under the statute of wills or of descents of the State of Illinois or from any other statute. If both those statutes were repealed, the right to dispose of property during life would remain. I take it for granted that there is no answer to that suggestion, or it would have been made.

MR. MORAN: If it had been made earlier it would have been answered.

MR. HARRISON: This provision is written on the face of the statute, and no argument by which you have supported an inheritance or succession tax includes these transactions *inter vivos*. How could the State escheat such property? When the black-robed usher is seen on the distant hill, does a state of incapacity to dispose of property begin at once? Are men to be restrained from giving exercise to those natural affections with which God has endowed them, and from the discharge of those duties which the domestic relations lay upon them?

A succession or transfer tax may be supported upon principles that may well include gifts and conveyances *inter vivos*, if there be nothing in the constitution of the state to prohibit it—if it be not a tax on property, or be not unequally laid. We are not here to deny that the

state may, as the United States did during the war, lay a tax upon conveyances and transfers *inter vivos* and upon testamentary conveyances or dispositions and upon inheritances.

I have answered sufficiently, I think, the suggestion that a part of this law may be stricken out as unconstitutional—the tax on strangers—and the tax on the near relatives be preserved. Your Honors know that that was not within the contemplation of the legislature of Illinois; and that this law as to ante-mortem gifts cannot be supported upon the propositions the gentlemen have contended for.

It may be true, as the opposing counsel have suggested, that we should apologize to the Court for occupying its time in discussing the questions whether there is a natural right of inheritance, or a natural right of testamentary disposition. But if your Honors please, I think if we will pause for a moment to contemplate the condition in which society would find itself if this monstrous power for which my friend contends were exercised by the legislature of any of our states, we would find a justification for this discussion. In forming their institutions, their national government and their state governments and constitutions, our people were careful to insert in bills of rights or in the bodies of their constitutions many limitations upon each of the departments of government. And, if your Honors please, these bills of rights are not subject to the rule "*expressio unius.*" That rule may apply to grants that are made and to powers that are conferred, but surely this Court will not say—it has often said the contrary—that there are not

rights reserved to the people beyond and above the special reservations of the constitutions and the special declarations of the bills of rights. There are things that are inherent in our system of government; that were born with our very institutions: rights of property; rights of persons; rights that do not find such expression—do not need to find such expression. As to tax laws and as to all laws affecting individual rights and liberties, the laws that are made by our states are to be read in the light of the fact that our government was builded and established for the protection of the individual, and upon the principle running through every part of its structure that men shall be equal before the law—an equality of rights and burdens.

Now let us suppose for one moment that the State of Illinois should repeal its law of wills and its law of descents. My learned friend thinks they may do so without violating any right. He thinks that it would not be an immoral thing; that it would not infringe any natural right; that it would not be a thing that could be condemned upon any principle of human justice or right, if they were to repeal those laws and, by eliminating all heirs, bring into force the doctrine of escheat and so take to the state all the property within its borders owned by its own citizens, and all the property within its borders owned by citizens of other states. No immorality, no natural right transgressed, nothing that should be shocking to our natural instincts, nothing inconsistent with the principles of free government! That is the doctrine proclaimed here. After all the care we have taken in forming our governments; after all the limitations which we find in the constitution of Illinois—to which I shall

presently refer—requiring that all tax burdens upon property shall be equal; after all those limitations for the protection of the individual, that no man's services and no man's property, however insignificant the amount may be, shall be taken without due process of law and without compensation—after all those precautions intended to secure men in their property rights—have things been left by the carelessness of our statesmen in such a position that a casual and communistic legislature of Illinois may take the entire body of individual property, which has been guarded so carefully in other particulars at the death of each owner? Have we constructed our system of government upon a principle that leaves it in the power of each legislature to establish state ownership of all property? Have we been careful about small fractions and yet left the body of our property rights, and our most cherished social and family rights, in such a condition that the legislature of a state has the power to destroy them all without guilt or moral dereliction or the transgression of any natural right or political principle? Is that the situation we are found in?

MR. JUSTICE BROWN: Suppose the legislature of Illinois should do that, and a man should die leaving a wife and father and mother and brothers and sisters—

MR. HARRISON: Will your Honor allow me to interpolate child?

MR. JUSTICE BROWN: No; I would like to have an answer to the question as put. In what proportion would you divide the property?

MR. HARRISON: I shall come to that after a while, if your Honor will allow me. I do not say that these nat-

ural laws have all been written out; that the details of them are expressed. That is for the legislature to do. The Federal Constitution, in recognition of these natural laws, established beyond cavil the natural right of property. By so doing it established, as essential attributes of property, the natural rights of inheritance and testamentary disposition; and to the states was wisely left the discretion of choosing between them according to state policy. But it is not an arbitrary discretion; it is one that is to be exercised on the lines of nature and those family obligations and relations which have characterized its exercise from the beginning. It is not necessary to inquire within what degrees of realtionship natural rights of inheritance may be confined, nor is it necessary to declare that such rights may not extend to the remotest relations. That there may exist amongst near relations various degrees of natural rights, and that different rights to acquire by inheritance may be accorded to different degrees of distant relations, are self-evident facts. These instances present essential differences furnishing a just basis for classification. But, if the statutes of wills and descents should be repealed, this Court would find some sound basis of protection in the revival of the doctrine of *post obit* gifts and conveyances or in the doctrine of family ownership. These statutes of descents and wills are but the evidence of presumed and effectuated intention.

Let us look a little further. May I ask my learned friend if the matter of heirship is so purely arbitrary whether the last legislature of Illinois might declare that the members elected to that legislature should be the heirs to the property of all persons dying within the State

of Illinois. If the designation of heirs is purely an arbitrary thing; if the child has no natural right, nor the wife, nor the brother, and the legislature has absolute power and arbitrary discretion, as he has told us, why may not the legislature name its own members as the heirs? If the sessions of the legislature are biennial, they might take unto themselves a good deal of property before the statute could be repealed. The doctrine is stated just as broadly as that. The legislature may do what it pleases; may take it all. There is no natural or fundamental right. They may name anybody to be heir, or they may name no one. And yet, if your Honors please, I think the courts would find some way to dispose of legislation that names strangers as heirs, and cuts out those nearest of kin. Does my honorable friend believe that the courts of Illinois would sustain a statute of descent that shut out child and wife and substituted strangers to be heirs to the estate? I cannot believe that he does or that he would affirm such a power in terms. And yet his whole argument imports that the power is just as despotic and arbitrary as that. What has become—what will become—upon this theory, of all our classification of real estate titles? What kind of a fee simple did the gentleman have in mind when he said that the owner could only hold for life; that no heir could take it; but that he might during his life give it to some other man who might hold it during his life? What did those old patents of the United States, under which all the land of Illinois is held, mean, when they granted a section or a quarter section of land to those hardy settlers and to their "heirs and assigns forever?"

MR. MORAN: Could not he alienate it?

MR. HARRISON: Alienate it? Of course. So could any grantee alienate it. But the fact that it was inheritable—that if he died without disposing of it and without making any testamentary disposition of it, it should go to his heirs—was a part of the grant. But it is said those heirs were not defined in the patent. It did not say his children; it did not say his wife; it did not say his brother. That was left to those modifications and regulations which the conscience of the states and the character of their political and social and property organizations might justify the legislature in making. It did certainly involve something more than a life estate which might be transmuted into the life estate of somebody else at the pleasure of the state and taken at last absolutely by the State. Can the title given by the United States be cut off by the State of Illinois by its refusing to define who the heirs shall be, and so taking the property to itself? Such a doctrine as that would paralyze all thrift and industry. Why should men work and wear out their strength in accumulating property if it has no family perpetuation? Suppose such a law to be enacted in Illinois as the gentleman defends; would not the universal rule of the state be "Let us eat and drink, for to-morrow we die?" All of the stimulus of thrift would be destroyed by the admission of such a doctrine as that. What is it that makes a father careful? He has married a wife; he has brought a child into life, and his care of them is not limited by his own life. The care and the duty project themselves beyond his grave; and he feels that he must—not that it is a privilege, but a duty

growing out of the family relation—that he must make provision for them. Does the gentleman believe that a man may not provide for his infant child when he dies; that every child is to become a foundling dependent upon the charity of the state?

MR. MORAN: This is not the sort of law you are attacking.

MR. HARRISON: I am attacking a principle that you have set up to support this law; the ground upon which you defend this arbitrary and unequal legislation, that a state may, without any breach of natural law or denial of fundamental rights, take to itself all property. I will speak of this particular law presently. You can only defend and uphold this law by this principle which you have proclaimed with such assured confidence. I am trying now to show the Court what effects the application of this principle would have upon the communities in which we live. The family relation would be broken; whatever obligation, whatever bond of duty, the expectancy of property places upon the child would be broken. The parent would have no motive to accumulate. The wife would be without provision. American society, American institutions are founded on the American home in which the father and protector of the family is also its provider; and not its provider only while he lives, but is to make for the helpless and dependent a provision which they shall enjoy when he dies. Are all the benefits that come to the state from family association, traditions and descents to be destroyed? Here stands a venerable man who has accumulated property through years of toil. Death draws near. The pulses of life beat slowly and

with the courage of a Christian faith he looks into the grave. But he may not call his son and bestow upon him the heirlooms of the family. He may not take from above the mantel shelf the sword he wielded in his country's defense and put it into the hands of his stalwart son that he may, in his generation, wield it also for his country. The state is to take it all. There is no natural right. The heirlooms, the old homestead, hallowed by family associations, the place of birth that has in it not only so much of sweetness but so much of wholesomeness and restraint—these go to the state. Its agent, the moment the spirit of that faithful man has taken its flight, steps into that abode and lays his hand upon all these things and carries them off to be at the disposal of the legislature of Illinois. Our social state, the property relation as we esteem it, all our business is builded upon the idea that a man's children and kin shall take that which he has accumulated. Can it be possible, I repeat again, after all the care we have shown, in protecting our property and our civilization, that the only thing that stands between us and an absolute state of socialism is the passage of a law that any casual legislature of Illinois may enact?

I have, as doubtless all the Justices have, tried some will cases. I have no doubt that some of your Honors, upon the benches of the state courts, have instructed juries in will cases where testamentary incapacity was alleged; and what is the test? First, did the man have sufficient memory and intelligence to recall his property, to know his possessions; and secondly, did he have sufficient intelligence and memory to recall those who had natural

claims upon him and to measure their just deserts? What has been meant by the courts in these instructions? So thoroughly has this doctrine of the right of a child ordinarily to inherit, subject to testamentary dispositions and to apportionment in particular cases, where the love or the duty or the service rendered by one child may authorize distinctions—so thoroughly has this idea been instilled into the minds of what Mr. Lincoln called "the plain people," that if you go into your own state, sir (turning to Mr. Moran), and empanel a jury to try such an issue and it is proven that the testator had declared his views of the family relation and of his obligations to be such as have been proclaimed here, the jury will find the testator to be non compos—incapable of making a will. The man who would say in connection with the making of a testament, that he did not think anybody's children had any natural right to share in a father's estate; that they stood in the same relation as strangers—

MR. MORAN: Would he not have a right to give all his property to strangers?

MR. HARRISON: Undoubtedly, if he was of sound mind. But in all such cases these tests would be applied; and in that case it would be asked how he came to give it all to strangers. If it could be proven that he had said, in connection with the making of his will, what has been said in this Court, there is not a jury in any of our states that would not return a verdict that he was of unsound mind. Such a verdict would be inevitable under such instructions as the courts give in all these cases, viz.: that the testator must appreciate the natural claims upon him. Does the gentleman say there are no natural claims? Has

the wife no natural claims? How does it come, then, that in your state, sir, as in mine and in all of the states, I think, the provision made by law for the wife takes precedence of creditors? There is a share of the estate set apart to her that cannot be touched by creditors. Will the distinguished gentleman tell me upon what basis that allowance can be sustained if she has no natural claim? The creditor has, he will allow, a claim that justice must recognize; but I do not know how a creditor would realize his debt if administration was not regulated by the states; I do not know how a man could recover property that was taken from him in life if the law did not provide writs of replevin and sheriffs. Because these things are provided by legislation it does not follow that the legislation may be arbitrary, or the rights given or regulated be taxed as privileges. It is an old maxim of the law that no one is heir to the living; but we have had an extension of the maxim.

The conclusion would not follow, however, even if this monstrous doctrine were admitted, that this law is valid, because the state must deal with all its citizens, not only in tax matters, but in all matters of grace and privilege, upon principles of equality. The grace of a Republican state is not a whim. An Eastern despot may take property from one and give it to another upon a whim, but the legislature of Illinois may not take or give in that way. When it attempts to show its grace in the matter of testamentary disposition it cannot create arbitrary classes and consequent inequality; its grace must proceed upon that principle of equality which must pervade all legislation.

The basis of citizenship—the political relation on which

our Government is founded—is that of equality of burden and of right. All men may be required to contribute of their property to the state; if it is necessary for the public service, they may be called upon to give their lives for the state—but it must be proportionately and upon some principle of selection—by lot for the draft; by rate and apportionment, if property is to be taxed. You may not take at one rate from one and at another rate from another of the same class; you may not exact a higher rate from one than from another. You may make taxes ratably upon some principle of proportion and equality. The intent to reach that end must be found in every valid tax law. I do not say that the law must or can be perfectly equal in administration. I do not say that inequalities may not arise, of a minor sort, under every tax law; but I do say that the aim and the purpose of such legislation must be to put an equal burden upon every citizen who is called upon to contribute. This principle is the very breath of our free institutions. What other defence has the minority, if, as is claimed in this case, a tax upon successions may be fixed at any amount and be limited to particular classes, based on value or wealth? The whole revenue of the state might be levied in Illinois upon a score or two of people, and all the rest of the population exempted from any burden of taxation.

I do not contemplate with satisfaction the accumulation of great wealth in the hands of a few individuals; but to prevent it I would not destroy the very foundations upon which our institutions rest. Least of all can those who have not wealth consent that there shall be introduced into our tax legislation an arbitrary principle that may assess

burdens now for the purpose—I think disclosed in the brief and confessed in the argument of the honorable counsel, to be one of the objects of the law—of dispersing property, for this arbitrary power will at another time turn and rend those who install it. As we have said in our brief, during the French Revolution they classified one degree of wealth as "superfluous" and took it all. I submit to my friend and to every right-thinking man whether we should not pay a fearful cost for the small relief we might get from tax burdens if we should introduce into our legislation a principle like that for which he contends. This equality of burden, making every man, according to his means, a contributor to the expenses of the state, is one of the most wholesome things in our civil institutions. It is the paying citizen who is the watchful citizen. What would the people of Illinois care what expenditures were made by the legislature if the entire amount were levied upon twenty wealthy men in that state? The best assurance of watchful care and interest in our institutions; the best assurance of honesty and integrity and economy in public expenditure, is in a wide distribution of the burdens of taxation—because the man who pays watches.

The provisions of the constitution of Illinois upon the subject of equality are very explicit and very full. I do not think the constitution of any of our states contains any more careful provision for securing an equality in taxation. As to property taxes, it requires that every person and corporation shall pay a tax in proportion to the value of his, her or its property. As to some specific callings which are named and among which we find the words "franchises" and "privileges" it is required that

the tax shall be uniform as to the class upon which it operates. The legislature is then given power to tax other subjects, but only in such manner as is consistent with the principles of equality fixed by the preceding section.

The Supreme Court of Illinois has said that it is a privilege that is taxed by the law under consideration. Your Honors will not think so when you read the law. The law, I think, clearly levies a tax on property. I know there have been decisions in these succession tax cases wherein it was said that because a lien for the tax is created on property that does not make it a property tax; but here every expression in the law shows that it is a property tax. The word "privilege" is not found in the law. What does it say? "All property, real, personal and mixed, which shall pass by will * * shall be and is subject to a tax at the rate of one dollar on every hundred dollars." That is what the law says; and not only that, but at another place it says the tax is to be on the value of this property. Running through every section of the law, the taxing section as well as the sections relating to administration, is the declaration that it is a tax on property. In the case of *Maine* v. *Grand Trunk* and I think in the *Home Insurance Case* and others, this Court have held taxes not to be a tax on Interstate Commerce, because the law said it was a tax on the franchise; and if it had not been for that declaration your Honors must have held in the one case that it was a tax on earnings, and in the other on property. Here we have a law that declares the tax levied to be a tax on property, not once, but many times; and as such it is subject to the

rule of uniformity to which I have referred in the constitution of Illinois. All these provisions for equality are now guaranteed by the United States in the Fourteenth Amendment. As Professor Burgess says, the United States, by the passage of that amendment, ceased to occupy the position of a mere "passive, non-infringer of individual liberty," and assumed the position of "an active defender of the same against the tyranny of the Commonwealths themselves."

I shall not attempt to discuss the breadth and reach of that great amendment. It is enough to say that for protection against the passion of the state, against any temporary movement that may wrest the people or the legislature of a state away from this great rule of equality and fairness to which I have referred, we no longer rest solely on the guarantees of the State Constitution, but on the Federal Constitution as well.

The ordinary tax which our states have used is the property tax and my friend defends in part the method of taxation introduced by this law upon the ground that at death the state can lay its hands upon property which during the life of the owner has avoided taxation by false returns. I recognize and condemn quite as strongly as my friend this secreting of property from the public assessor. It is a crime against the state; and the man who hides his property in order that it may escape its fair share of the public burdens is a malefactor. He is of kin to the man who skulks when the call comes to fight for his country; and the man who dodges about from one state to another to escape taxation is of kin to the man who sought Canada during the civil war in order to avoid

a patriotic duty. There is such an evil—a very great one—but it is not to be cured in this way. Are we to admit that our legislatures and our administrative officers are inadequate to the duty of preventing the secreting of stocks and securities from the tax list? I do not think any legislation can be too severe that will bring the recreant citizen to his duty. I have no patience whatever with this too much talk about the privacy of one's own affairs—that the state must not inquire into private business. Under our association as citizens we are partners. We have come under obligations to share equally the burdens of government; and you have a right to know whether I am paying my share or not. You have a right to demand that I shall make a disclosure of what I have. I should not think it too severe a penalty for this prevalent offense if, in the exercise of their rightful power, the legislatures were to enact that a legatee should not take any property that the testator had fraudulently concealed from the assessor. If one repudiates the ownership of property for a series of years in his tax returns it might very well be regarded as an estoppel when the legatee claims it. But the law now under consideration is not a remedy for the evil.

The Massachusetts Tax Commission have recently submitted a report to the Governor of that state recommending that the property tax, by reason of the difficulty of collecting it, should be abolished, and an inheritance tax and some other taxes substituted. My friend would not agree to the abolition of the property tax, and he would be right. A succession tax ought not to be made a substitute for the personal property tax. The faults and

defects in the administration of one law ought not to be the reason for enacting another founded on inequality. The proposition for which we contend does not shut out the State of Illinois from levying an equal and fair tax upon inheritances and successions unless it is a property tax, and so double taxation under the Constitution of the State. The gentleman does not speak to the record when he intimates that we represent people who desire to be exempt from any tax. Those we represent, and in that they represent the common interests, are only anxious that this tax shall be put upon a basis of equality and predicated upon a principle that is not destructive of all our social relations and all our property interests.

As to exemptions, the gentleman says, with great emphasis, What is reasonable? Who is going to say? Well, how does the legislature say? It is bound to make them reasonable. It is under precisely the same difficulty that the Court is. There is no fixed rule. We cannot say that only so much may be exempt in any case; we must look at the amount of an exemption and see whether it is one that is established for a public purpose; whether there is a public reason to support it. In other words, everybody should be interested that the exemption be made. It should not be a favor to the class or individual exempted. The exemption should rest upon some public consideration that would authorize it as in the interest of all. For instance, upon the theory that it may cost more than it is worth to collect it, or upon the theory that by taking from those of very small means we are liable to take from them the power to make a living and thus throw the burden of their support on the community.

But when exemptions are plainly resorted to for favoritism; when they are based upon individual favor and a bonus to the majority, and not upon any public consideration; when it appears that they are used as a means of classifying by values, then this Court will say, that while there is a legislative discretion to do what is reasonable, that is not reasonable and we will not sustain it.

As to this exemption of $20,000 to each legatee of the first class. It might result in exempting an estate of $250,000 wholly from taxation if there were heirs enough to take it in portions of $20,000. That is the method of classification here; it is nothing more than a class favor. It does not rest upon and cannot be supported by any public consideration whatever. It is a system of classification upon values. Now it is interesting to note, as we pass, that the constitution of Illinois, as to the tax upon property, does not allow the exemption of a dollar—not even the dray and the old horse that draws it. So exacting is the law that every man must pay according to the value of what he has. The tax gatherer gets his returns if it is only ten dollars. The constitution allows the property of churches and schools and property used for charitable and such like purposes to be exempted; and the Supreme Court of Illinois has held that this provision excludes the power of the legislature to exempt anything else or any other person from taxation; that the legislature of Illinois cannot exempt so much as ten dollars, under the constitution of that state, from the property tax. When we look at the exemptions in this law we see that they were manifestly conferred as favors; that they were resorted to as

means of classification; that they cannot be rested upon any public consideration; that they were intended to free the great bulk of individual property and of individuals from any tax.

As to these exemptions and their character, a word or two more. There is a curious sort of classification here. The first class consists not only of lineals ascending and descending, but of collaterals. It embraces brothers and sisters. To that class there is allowed, to each person taking a legacy or an inheritance, an exemption of $20,000. The first class includes father, mother, husband, wife, child, brother, sister, wife or widow of a son, or husband of a daughter, or any child or children adopted, or any lineal descendent born in lawful wedlock. So that if there were twenty legatees an estate of twenty times $20,000—or $400,000—would be wholly exempted. Upon what principle can this be justified? The answer in the appellee's brief and in the oral argument is that the legislature may do that in order to disperse estates. It is a curious fact that in the second section of this act, in attempting, as it seems to me, to repeat the description of the first class, certain members of that class are left out. I refer to the provision in reference to life estates in the second section. Some have been left out, I think, inadvertently. I wish your Honors would look at that second section. All life estates devised to father, mother, husband, wife, brother, sister, widow of a son or a lineal descendant of the testator, with a remainder to a collateral heir, are exempt. In the first place, I want to call your Honor's attention to the amount of that exemption. An estate for ninety-nine years or longer, as Mr.

Guthrie has said, given to one of the persons named, though it might be worth $50,000 a year in rentals, and in its aggregate value millions of dollars, goes wholly without taxation. This is the most senseless and incongruous provision that I ever saw in a public statute. The remainder must go to a collateral or to a stranger in order to free the life estate or estate for years from the tax. If then a man left a life estate to his child and the remainder to his grandchild the life estate would not be exempt, but if the remainder were given to a nephew it would be.

MR. MORAN: I think you misinterpret the law.

MR. HARRISON: I am sure I do not. Let us read it. "When any person shall bequeath or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of the son ('the wife of the son' is left out) or a lineal descendant during the life or for a term of years or remainder to the collateral heir of the decedent, or to the stranger in blood or to the body politic or corporate at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax." What is the condition? The life estate to one of the persons named, the remainder to a collateral. Does it not say so? Will the gentleman tell me what other possible interpretation there can be? I am sure you will see, when you read it, that the life estate is only exempt when the remainder goes to a collateral, but that is only one instance of the incongruity of the law. In addition to the $20,000 there is given to this class an exemption of property that may run up into the millions in value. How can that be defended? Only upon the principle announced

by appellee's counsel that it is not a tax at all—that it is a "bonus," and that a bonus is not subject to the law of equality. They say to people of this class: We will let you devise life estates of any value free of tax, but if you want to devise anything else—any other form of title —of less value, you must pay a tax. We have here exemptions that constitute classifications of property that are based upon favoritism, and upon no possible public consideration.

I now come to the progressive features of this tax. I do not suppose that any lawyer would defend a progressive tax on property in Illinois. It is defended only on the ground that succession is a privilege, like a franchise to a corporation, as if each of these persons were coming to the legislature and asking the privilege to take as heir or legatee. If it cannot be supported upon that ground, and is not also free from the further limitation I have suggested, that even acts of grace must be uniform, then progressive taxation will find no defense. I have shown that in the Constitution of Illinois the idea of uniformity, of an equal rate, is the dominant thought in the tax provisions. Upon what principle can it be said that a man shall be discriminated against in this succession tax to the amount of $100 because he gets one dollar, or even fifty cents, more than somebody else? If there is an increase of rates it should only be on the increased amounts, the same sum paying always the same rate. There should be so much on the first ten thousand and so much on the second, if any progression is allowed, and that is an extremely dangerous policy. But when you carry the increased

rate back so that the six per cent., payable on estates of over $50,000, is assessed not only on all above that amount, but on the first $10,000 that is taxed at three per cent. and the $20,000 that is taxed at four, we have a gross abuse of the power of classification.

I want to say a word about classification, and then I will close. The Supreme Court of Illinois says this law makes six classes; two are classifications of persons upon the basis of kinship, and four are said to be classifications of property on the basis of value. We admit the principle that the legislature may classify relationship for succession taxes, and that only uniformity in the class is required. But if the basis of classification may be value or wealth, you have opened the way to absolutely arbitrary and unrestrained taxation. You have broken down every requirement looking to equality in the Constitution of Illinois and in the Fourteenth Amendment. You have made nugatory this great charter, the protection of which we are asking. This doctrine of classification appears in other matters than tax cases. In many of the states we have laws requiring legislation to be general, and the courts have said that it is general if it applies to a class —as to cities of a certain population. Upon that basis we have had legislation with reference to cities of the first, second and third class—according to population, but always so that a city of the second class may come into the first class as its population increases. In the *Gulf and Colorado Case*, where a special attorney's fee of only ten dollars was levied in certain suits against railroad companies, the Court said: "You have not adopted an admissible classification; it does not appear that there is any

reason why railroad companies should pay a docket fee in certain cases and nobody else," and the Court declined to assume that the legislature might have some reason for such a classification. It was not classification, and the law was declared to be in contravention of the Fourteenth Amendment. The doctrine declared over and over again, under the Fourteenth Amendment, is that the legislature is to *find* classes, not *make* them. They are like the poets, born and not made. There must be some natural distinction and division; something that actually exists before the legislature acts. In this case the Supreme Court of Illinois has justified a classification based only on wealth; and if you admit that as applicable to general taxes, then I repeat that every provision intended to secure equality is destroyed, because of the evasive and illusive answer that it is equal within the classes, and upon a division that the legislature has chosen to establish.

It seems, then, to me—and I have not had opportunity or time to read to your Honors the numerous citations which appear in our briefs—that this right of inheritance and of testamentary disposition is natural and fundamental, in the sense we contend for. Blackstone—and that expression of his has been at the root of all the foolish talk that has been indulged in—speaks of an utterly unorganized state, when there was no society at all, no civil government, no control, each man for himself. He said that in a state like that it did not seem to him that the child had a natural right to take the property of the parent; that when a man died his property was *res nullius*, and whoever got it had it. Possession and the power to hold it was ownership. It is

because there is no law that he keeps who can; he gets who can. But the authorities we have cited show that from the dawn of history in the earliest records, both these rights existed—the testamentary right and the right of inheritance. The right of disposition is an incident of property. Property is the right to possess, enjoy and dispose of a thing. The testamentary right seems to me to originate in the very nature of property and to be an incident of it. The right of inheritance goes back to the beginning, and these two great natural rights have come down to us—sometimes this one restrained and the other given greater scope; now the testamentary right extending only to a third of one's estate; now to all; and now the testamentary right limited in favor of the widow, so that her portion might be secure. These great natural and fundamental rights are both recognized; and though neither of them is written out on tables of stone, they are both engraved on the fleshly tablets of every man's heart. They have both come down to us from the earliest dawn of history. It does not militate against our proposition that these are natural rights because there seems to be a conflict between them. The one cannot wholly prevail without destroying the other. The statute of descents, as the Courts have said again and again, is the expression of the legislature upon its conscience and duty as to what is the natural law—as to what should be the natural intention and desire of a testator. The legislature, taking no account of the particular family relations in which service and duty, or insubordination and rebellion may swerve the application of this right one way or the other, defines it as applied to gen-

eral cases. The family relation and property rights have been built up and stand upon these two great natural rights. The legislature does not give them; it defines them. Perhaps primogeniture was quite natural in feudal times. There must be one head of the castle, that the duty to the king might be discharged and the defense of the castle made good. In every state of society there is this reason or that, why some preference shall be given to one or to the other; but both have survived and will survive as natural rights. When they cease to be recognized as natural and fundamental rights, we shall have dissolved the basis on which society rests.

Nos. 425, 463 & 464

ILLINOIS INHERITANCE TAX CASES.

Supreme Court of the United States.

OCTOBER TERM, 1897.

JOSEPHINE C. DRAKE ET AL., Executors, &c., *Plaintiffs in Error*,
vs.
DANIEL H. KOCHERSPERGER, County Treasurer, &c., of Cook County, Illinois.
No. 425.

ELIZABETH EMERSON SAWYER ET AL., Executors, &c., *Plaintiffs in Error*,
vs.
THE SAME.
No. 463.

JESSIE NORTON TORRENCE MAGOUN, *Appellant*,
vs.
ILLINOIS TRUST AND SAVINGS BANK, as Executor, &c., of Joseph T. Torrence, deceased, and DANIEL H. KOCHERSPERGER, County Treasurer, &c.
No. 464.

OPINION OF SUPREME COURT OF MISSOURI HOLDING UNCONSTITUTIONAL LAW IMPOSING GRADUATED SUCCESSION TAX.

Supreme Court of Missouri.

IN BANC. OCTOBER TERM, 1897.

THE STATE OF MISSOURI EX REL. Executors of the Last Will of John C. Conley, *Relators,*

vs.

LEWIS M. SWITZLER, Judge of Probate Court, Boone County, *Respondent.*

GANTT, C. J.: This is an original proceeding in this court for a writ of *certiorari* to the judge of the probate court of Boone County, commanding him to send up the record of his proceedings in the matter of the assessment and levy of a collateral succession tax upon the estate of John C. Conley, late of said county, deceased.

The writ was issued and made returnable to Division No. 2 of this court, but owing to the importance of the questions involved and the fact that a similar writ had also been issued upon the application of L. R. Wilfley, executor of Susan E. Spear, against Judge Rassieur, judge of the probate court of the City of St. Louis, returnable to the Court *in Banc*, this cause was transferred to Court *in Banc*, and the records of the Probate Court in each case having been removed into this court, the two cases were heard together upon a motion to quash the proceedings for want of jurisdiction in said courts to assess and levy said collateral succession tax.

John C. Conley died in Boone County, Missouri, on the 6th day of December, 1896, leaving an estate consisting of realty in this and other states and of bonds, notes, certificates of stock and other securities.

His will, dated February 18, 1896, was duly established and admitted to probate by the probate court of Boone County on the seventh of December, 1896.

The said testator was never married. He made a bequest of twenty thousand dollars for charitable purposes, and gave the remainder of his estate in different amounts to his collateral relatives. He gave some special legacies of a certain amount, and, after the payment of various special bequests, the residue of the estate is given by his will to certain nephews and nieces named in the residuary clause.

Letters testamentary were duly issued to the relators, who qualified as executors of the will on the fifteenth of December, 1896, and filed their inventory on the eleventh of January, 1897.

The probate court, on the thirtieth of August, 1897, entered an order of record, reciting the death of said John C. Conley, the probating of his will and setting out the terms thereof, the date of letters testamentary and of the filing of the inventory, and over the protest of the relators (who waived formal notice of the proceedings, but objected to the right of the court to make such assessment), proceeded to fix the value of said estate, for the purposes of the collateral succession tax, under the Act of April 1, 1895, and the amendatory Acts of 1897.

The court found that the sum of $20,000 was given by the will to trustees for charitable purposes; $18,391.31 of the estate will be required to pay the debts of the testator (so far as appeared up to the date of that order) and other legal demands; that the real estate in the State of Missouri was of the value of $45,660, and that the personal property of the estate was of the value of $182,919.34, making a total valuation of $228,579.34.

The court deducted from this amount the sum of $20,000 given for charitable purposes, and $18,391.34 required to pay debts and expenses of the administration, and held and determined that the clear market value of all of said property, subject to such tax, was $190,188; and that said amount was subject to the payment of a collateral succession tax of five dollars for each and every one hundred dollars of such sum up to ten thousand dollars, and twelve and a half dollars for every one hundred dollars in value in excess of said sum of ten thousand dollars.

Eighty-five shares of stock in the Bank of Hico, Texas, of the par value of $8,925 was included in the above valuation. The court then levied and charged said estate with a total tax of $23,023.50 and ordered the executors to pay the same. All these facts appear upon the face of the record of the probate court. A similar state of facts exists as to the tax on Susan E. Spear's estate in all material respects.

The constitutionality of the Act of the General Assembly of Missouri entitled "An Act providing for the endowment of the State University, and for the establishment and endowment of free scholarships of merit therein in each county," approved April 1, 1895, and of an Act of the General Assembly entitled "An Act to amend an Act passed by the 38th General Assembly of the State of

Missouri entitled 'An Act providing for the endowment of the State University and for the endowment of free scholarships of merit therein in each county;' by adding a new section after Section 1 of said Act to be numbered Section 1*a*, which new section shall read as follows," approved March 16, 1897, is directly assailed in and by these proceedings.

The proposition of relators is that both the Act of April 1, 1895, and the amendatory Act of March 16, 1897, are void because in conflict with various provisions of the Constitution of Missouri and the fourteenth amendment to the Constitution of the United States.

No question is raised as to the power of this court by *certiorari* to supervise the proceedings in the probate courts, and if their action in levying said taxes is found in excess of their powers, to quash their proceedings, and we have no doubt of our power to do so.

At the risk of being deemed prolix, we will insert so much of the acts as bear directly upon the questions raised.

The act was passed in 1895, and amended by two acts passed in 1897. As amended, it provides, among other things, as follows:

SECTION 1. That all property conveyed by will or by the death of an intestate to any person other than the father, mother, husband, wife or direct linial descendant of the testator or intestate, except property conveyed for some educational, charitable or religious purpose exclusively, shall be subject to the payment of a collateral succession tax of five dollars for each and every one hundred dollars of the clear market value of such property.

SEC. 2. That, in addition to the fees now provided by law, no corporation shall be organized under the laws of this state, and no foreign corporation shall do business in this state unless the incorporators shall, upon filing the articles of association, pay to the state treasurer, in trust for the State of Missouri, to be disposed of as hereinafter provided in this act, the sum of twenty-five hundredths of a dollar for every thousand dollars of the capital stock of such corporation as a franchise fee; and a like franchise fee shall be paid in the same manner on every thousand dollars of the increase of the capital stock of any corporation.

SEC. 3. That every manufacturer of patent medicines shall annually pay a license tax of twenty-five dollars.

SEC. 4. That all moneys which may hereafter escheat to the state shall be distributed in the manner provided by this act.

SEC. 5. That all taxes, fees or moneys received under this act by any county official shall be paid during the first week of the follow-

ing month to the county treasurer, who shall credit three-fourths to a fund hereby created, to be known as "the state university scholarship fund," and remit the remaining one-fourth to the state treasurer; and from all money received directly by the state treasurer under this act, he shall monthly reserve one-fourth, and remit the remaining three-fourths to all the county treasurers of the state, to be credited to "the state university scholarship fund" of such counties.

SEC. 6. That all moneys received by the state treasurer to be retained by him under this act shall be deposited in the state treasury to the credit of the "seminary fund" as provided by law.

SEC. 7. That all moneys received by the county treasurer of each county to be credited to "the state university scholarship fund" shall be forever kept and preserved as a sacred permanent fund, and shall be invested and loaned in the manner provided in this act.

Sections 8, 9 and 10 of the act are in the following words:

"SEC. 8. The income of the moneys in 'the state university scholarship fund' shall be collected annually, and one-fourth of the same added to the principal, and the remaining three-fourths shall be faithfully appropriated for establishing and maintaining free scholarships in the state university, the amounts and terms of which shall be fixed and changed from time to time, as may be necessary, on the written order and resolution of the board of curators of the state university.

"SEC. 9. On the first week of August of each year, beginning with the first Monday after due notice thereof, as prescribed by the county court, in two newspapers of each county, representing different political parties where such newspapers exist, there shall be at the court house, in the county seat, an examination of all applicants qualified under the law to be students of the university. Such applicants shall be actual residents of the county, and such examinations shall be conducted by three examiners, one of whom shall first be appointed by written notice to the county clerk by the president of the board of curators of the university during the month of July, and one selected thereafter by the county court, of another political faith, and the third selected by the agreement of the two so chosen, with power in the county court, or the presiding judge thereof in vacation, to fill all the vacancies in the position of examiner; and such examination shall be written, and shall meet the requirements for entrance in the academic department of the university. Provided, that the duties imposed on county courts

or the judges thereof, by this section, shall be discharged in the City of St Louis by the mayor.

"SEC. 10. Those applicants passing the best and most meritorious examinations, to the number of scholarships established in each respective county, shall be awarded such scholarships, and be entitled to enter thereon, free of matriculation fees, any department, school or college of the university, *and have paid to them in equal monthly installments, while attending the university, the sum provided by the scholarship so awarded for defraying the expenses of such attendance. Provided, that no applicant shall be qualified to receive such scholarship unless such examiners shall be satisfied that the applicant is dependent upon his own exertions for his education, and financially unable to otherwise obtain the same.*"

By comparison of the act thus revised and amended in 1897 with the original Act of 1895, it will be seen that the progressive feature of the original act—to wit, the increase of seven and one-half per cent. on amounts of over ten thousand dollars—is repealed, and specific provision is added for valuation of inheritances and enforcing the collection of the tax.

Amendments are also made to Sections 2 and 3 in matters not material in the present proceeding, while in Section 5, the basis of the distribution of the funds collected by the State Treasurer in trust under the provisions of the act is altered so that it is made in the different counties on the basis of representation in the General Assembly.

Lying at the threshold of this discussion is the objection which goes to the very substance of this enactment.

It is insisted that the tax provided in the act is not levied for a *public purpose* within the meaning of Section 3 of Article 10 of the constitution of Missouri, which ordains that "taxes may be levied and collected *for public purposes only.*" This provision of our constitution accords with the definition of a tax as expounded by the courts and law-writers of this country.

Judge COOLEY in his work on Constitutional Limitations says: "Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes."

Judge COULTER, in Northern Liberties vs. St. John's Church, 13 Penn. St., 104, said: "I think the common mind has everywhere taken in the understanding that taxes are a public imposition, levied by authority of the government for the purpose of carrying on the government in all its machinery and operations—that they are imposed for a *public purpose.*"

The Supreme Court of the United States, in Loan Association vs. Topeka, 20 Wall., 655, in a luminous opinion by Judge MILLER, after a review of the authorities and a discussion of the power to tax, laid it down as an established principle that, "beyond cavil, there can be no lawful tax which is not laid for a *public purpose.*"

In the Matter of the Mayor of New York, 11 John., 80, the court said "the word 'taxes' means burdens, charges or impositions put or set upon persons or property for public uses; and this is the definition which Lord COKE gives to the word 'talliage' (2 Coke Ins., 532); and Lord HOLT, in Carth., 438, gives the same definition in substance of the word tax."

Chief-Justice APPLETON in Allen vs. The Inhabitants of Jay, 60 Maine, 124, says: "A tax is a sum of money assessed under the authority of the estate on the person or property of an individual *for the use of the State.*

Taxation by the very meaning of the term implies the raising of money for *public use* and *excludes* the raising if for *private objects and* purposes."

Judge JERE BLACK in Sharpless vs. Mayor, 21 Penn., 167, says: "I concede that a law authorizing taxation for any other than a *public purpose is void.*"

We construe Section 3 of Article 10 of our constitution as a direct inhibition upon the General Assembly to levy a tax for a private purpose, or for the benefit of any private individual. The language used is not susceptible of any other construction.

We shall assume without further comment that if the act under review authorizes the levy of a tax, that tax must be for a public purpose, otherwise it is a direct violation of the constitution of this State. Does it authorize a tax? The learned counsel for the probate judges argues that it is not strictly a tax. He says "although called a tax it is not properly so, but a bonus or price exacted from the collateral kindred and strangers to the blood as the condition upon which they take the estate whose owner is dead."

But even if such a distinction can be maintained, the contention does not reach the vital point upon which the relators insist, namely, that by whatever name this burden, or excise, tax, bonus or exaction from the citizen may be called, still it falls within the purview of the word "taxes" as used in the third section of Article 10 of our constitution.

The word in that section is used in its generic sense as expounded

by lexicographers, Judges and lawyers, long before its use in our organic law.

In the sense that *taxes* can *only* be levied for a *public purpose*, that word includes every character and kind of tax, general or special.

The power of the State to demand such a bonus is referable and referable only to the taxing power, so that whether this "collateral succession tax" as it is denominated by the Legislature, be termed a tax or a bonus, an excise, a price imposed for the privilege of taking an estate by will or inheritance, it must be levied or exacted for a *public purpose only* under our constitution, and under those limitations on the taxing power which exists in the very nature of our free institutions (Miller on the Constitution of the U. S., p. 242). Outside of express constitutional inhibitions there are limitations upon the powers of every branch of our governments, state and federal. Every branch has its limitations short of absolute power.

The Supreme Court of the United States expressed it in these words: "No court would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be so no longer, but that A should thereafter be the husband of C, and B the wife of D. Or which should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B." And, in the same case, the court further said: "To lay with one hand the power of the government on the property of the citizen and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

That the State of Missouri for public purposes may assess and levy taxes upon the succession or devolution of property under our inheritance laws or statute of wills, subject only to the prohibitions of the constitution of the state and the constitution of the United States, we have no doubt whatever. The constitutionality of such a tax has been too long affirmed by the courts of last resort to admit of doubt; but we have not found, nor have counsel pointed to any statute which has received the sanction of the courts, which levied such a tax for other than a plainly public purpose. Is the purpose for which the act in question authorizes this collateral succession tax a public one? Perhaps few branches of the law have been more carefully considered than that which this inquiry suggests.

The duty and power of imposing taxes is a legislative one, and

the presumption is and must be that the Legislature will only levy a tax for a public purpose, and the courts are only justified in interposing when it clearly appears that the constitution, which is the supreme law governing both the Legislature and the courts, has been or will be violated by the enforcement of the legislative purpose.

What is and what is not a public purpose is not always easily determined.

The Supreme Court of the United States in Loan Association vs. Topeka, 20 Wall., 655, states the rule to be, that "in deciding whether in a given case the object for which the taxes are assessed falls upon the one side or the other of this line, the courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and acquiescence of the people may well be held to belong to the public use and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." The Supreme Court of Michigan in The People vs. Salem, 20 Mich., 452, with signal ability and thoroughness discussed this question and came to the conclusion that "the term 'public purpose' as employed to denote objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit to follow.

It is, on the other hand, a term of classification to distinguish the objects for which, according to settled usage, the government is to provide from those which, by the like usage, are left to private inclination, interest or liberality."

How these general principles have been applied, reference to the judgments of the courts will best determine.

In Loan Association vs. Topeka, 20 Wall., 655, a statute of the State of Kansas which authorized a town to issue its bonds in aid of the manufacturing enterprise of private individuals came before the Supreme Court of the United States, and it was held void because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid in the projects of gain and profits of others and not for a public use in the proper sense of these words.

In Allen vs. Jay, 60 Maine, 124, a town at a meeting legally called voted to loan its credit to a firm to the amount of ten thousand

dollars and issue its bonds for that sum, provided the firm would invest twelve to thirteen thousand dollars in a steam saw mill with a run of stone to grind meal and maintain it for ten years, and the Legislature afterwards passed an enabling act authorizing said loan, but the Supreme Judicial Court held the act unconstitutional and void because not for a public use.

All the buildings on a very large portion of the City of Charleston, South Carolina, having been destroyed by fire, the City Council passed an ordinance providing for the issue of bonds by the city to be loaned the owners to build and rebuild the waste places and burnt districts.

The Legislature afterwards, by an act reciting the ordinance, fully confirmed and authorized the issue of said bonds known as Fire Loan Bonds, and certain persons bought them. Afterwards, suit was brought against the city to collect them, but the Supreme Court of the State held said bonds were issued for a private purpose, and void—that the taxing power could only be exercised for some public purpose.

In November, 1872, a great conflagration swept over a large portion of the City of Boston.

The Legislature of Massachusetts passed an act authorizing the City of Boston to issue bonds and loan the proceeds on mortgage to the owners of the land to enable them to rebuild their houses.

The Supreme Court held the act void; that it was not for a public object in a legal sense.

In Carter's Admr. v. Whipple, 24 Wisc., 350, the Legislature empowered the Town of Jefferson to raise a sum by taxation, to be paid to the treasurer of "The Jefferson Liberal Institute," a private educational institution, but the Supreme Court held the act void, the tax being for a private purpose, and a like conclusion was reached in Jenkins vs. Anderson, 103 Mass., 74.

This court in Deal vs. Mississippi County, 107 Mo., 464, held Section 5697 R. S., 1879, void, because it gave a bounty to private individuals for growing forest trees upon their own lands.

In each and all of these cases it was held that the fact that the public might be incidentally benefited by rebuilding a burnt city, the establishment of manufactories and schools, would not sustain the tax.

Every factory, every private school or academy, every industrial enterprise which furnishes opportunity for labor and the earning of wages, benefits a community in one sense, but the *indirect* good

which inures in this way furnishes no basis for taxation of other business to build up such occupations.

Learned counsel for the respondents do not seriously controvert this general proposition, but meet it with the assertion that the State University is a State institution established and maintained for a public purpose. This is at once conceded by the relators because the people of Missouri in their sovereign capacity have recognized and declared in their organic law that "a general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people, and imposed upon the legislature the duty of establishing and maintaining free public schools for the gratuitous instruction of all persons in this State between the ages of six and twenty years." Art. II., Sec. 1, constitution of Missouri, 1875. Moreover, by Sec. 5 of Art. II, of the constitution, "the general assembly is enjoined, whenever the public school fund will permit and the actual necessity of the same may require, to aid and maintain the State University now established with its present departments." By Section 6 of the same article of the constitution a fund is provided, "the annual income of which together with so much of the ordinary revenue of the State as may by law be set apart for that purpose" shall be appropriated for the maintenance of the free public schools and the State University.

If, then, this collateral succession tax is levied to support the State University, unquestionably it is for a public purpose.

At this point, however, the real contention in this case arises. Relators insist that the fund sought to be accumulated by this tax is not a provision for the support of the University, but is a tax to raise a fund the proceeds of which must be paid to certain favored individuals to enable them to buy food and clothing for their own use while pursuing their studies at the University. The controversy must be determined by the act itself. By reference to the summary of its various sections as hereinbefore set out, it will be observed that three-fourths of all the moneys raised by this tax was intended to create "the State University scholarship fund" of the several counties of this State to be kept as a permanent fund to be invested so as to bear interest. This interest is to be collected annually and one-fourth of it added to the fund and the remaining three-fourths to be appropriated for establishing and maintaining free scholarships in the University, the amounts and terms of which are to be fixed by the curators of the University. By section 9 provision is made for competitive written examinations on the first week of August in

each year of actual residents of each county which shall meet the requirements for entrance in the academic department of the University, provided, however, that no applicant shall be eligible to receive such free scholarship unless the examiners "shall be satisfied that the (said) applicant is dependent upon his own exertions for his education and financially unable to otherwise obtain the same."

Having thus determined who may be the beneficiaries of this tax and segregeted them from the great mass of citizenship, and awarded them these free scholarships, Section 10 of the act provides "they shall be entitled to enter thereon free of matriculation fees any department, school or college of the University, *and have paid to them in equal monthly installments while attending the University the sum provided by the scholarship so awarded for defraying the expenses of such attendance.*"

Deferring for the present any discussion of the proposition that one-fourth of the tax may be sustained because it is directed to be paid into the State treasury for the benefit of the "Seminary Fund," an admitted public use, we direct our attention to the arguments for and against the "free scholarship fund." It is perfectly evident, we think, that no distinction can be maintained between the fund and its annual increment.

It cannot be true that this fund is a state or public fund under this act while the whole beneficial use and interest arising therefrom is private. Such a distinction is illogical and unsound. The fund is created for the sole purpose of producing the interest to be derived from it, and it is incredible to believe that the Legistature would have provided the tax at all if it was not to obtain the interest to be used for the maintenance of the scholars. The fund and the interest are inseparable.

Counsel for the curators urge that this statute can only be properly construed by keeping in view "the historical setting" of the University and "its historical genesis." They assert that university education is a proper, indeed one of the primary, objects for which public taxation may be levied, and that the extent of such taxation in aid of higher education is for the Legislature alone to determine; that the constitution having established the free public school and the university, the Legislature can go further and furnish free support of the children while attending these schools and the University. It is true that the learned counsel for the curators are not altogether in harmony on this proposition. Some of the learned

counsel for the curators boldly argue that, if the Legislature can furnish free scholars and free teachers, why can it not go further and furnish a free support to the children who attend these schools, if that is deemed necessary to make the system a success, whereas their colleague draws the line at the free support of the students of the University and denies the right to furnish free living to the children attending the common schools, "because the law recognizes and enforces the parental obligation of support during the period of elementary education." Some of the learned counsel for the curators admit that such a support of the students is paternalism in its most pronounced form, but say it is "*not of a hurtful or dangerous kind; that it is only paternalism of the State, not of the Federal government.*"

Paternalism, whether State or Federal, as the derivation of the term implies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental regulation of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing their own affairs, and is pernicious in its tendencies. In a word, it minimizes the citizen and maximizes the government.

Our Federal and State governments are founded upon a principle wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent States were capable of self-government—a system in which the people are the sovereigns and the government their creature to carry out their commands. Such a government is founded on the willingness and the right of the people to take care of their own affairs, and an indisposition on their part to look to the government for everything.

The citizen is the unit. It is his province to support the government, and not the government to support him. Under self-government we have advanced in all the elements of a great people more rapidly than any nation that has ever existed upon the earth, and there is greater need now than ever before in our history of adhering to it.

Paternalism is a plant that should receive no nourishment upon the soil of Missouri. While the exigencies of this case may require the operation of such a principle, we are sure its germ is not to be found in the constitution of this State, nor in the spirit of its people. Whatever other fault the constitution of 1875 may have, it is certain that its framers sought most sedulously to curb the power of those

clothed with authority to legislate in behalf of favored classes, and to leave the people the largest possible control over their own affairs. Especially has the power of taxation been jealously hedged about and limited. The same authority is found in the constitution to levy taxes to clothe and feed the children who may desire to attend the free public schools as there is to raise money by taxation to hand over to young men and young women to support them while they acquire what is termed "the higher or university education," *but we find no warrant for either in the organic law of this State*, or in the character of our government.

It is one thing to provide for the establishment and maintenance of a State University, and a system of free public schools, the State through its own officers, agencies and municipalities constructing and owning the buildings and apparatus and employing the teachers as public functionaries responsible under her own laws for the discharge of their duties, and a wholly different thing to support private individuals who attend the University and public schools by public taxation.

But it is said that nothing is more common than the endowment of free scholarships as a part of the endowment of a university. This may be true of the universities of Europe, and individual instances are to be found in this country, where some great benefactor of the race has out of his own bounty provided such scholarships, but these examples furnish no guide to the free States of this Union, clearly not to the Legislature of Missouri under its organic law.

The act under consideration endows the scholar, not the University. It provides in unmistakable terms that a fund shall be raised by taxation and paid over to students attending the University for *their support* while so engaged.

It is a pure and simple gift of public money by the State to private individuals for their own private use, in plain violation of Section 46, Art. 4 of the constitution, which prohibits the Legislature from granting public money "to any individual, association of individuals, or other corporation whatsoever." We hold that when the constitution provided for the establishment and maintenance of the University, it conferred authority to support an institution belonging to the State, and this grant is not to be extended to the *unlimited support* of the *pupils* who may attend or desire to attend that school. In obedience to the mandate of the constitution, the Legislature has made generous provision for the University and public schools, and the opportunities for education are commensurate

with the greatness of the commonwealth and the needs of the people. Neither the constitution nor a sound public policy demands that the State should indirectly stifle all motive for individual effort and laudable ambition. Free common schools adorn every school district in the State. Splendid normal schools are distributed to its different sections, and the doors of the University are practically opened to every thrifty, energetic young man and woman in the State. The State has not been niggardly with its children; every proper stimulus is set before them. But here she stops and says to the citizen, the right to lay further burdens for your private benefit is exhausted. Under equal and just laws, by your own self-reliance and energy, you must win the rewards of labor, and the honors of the State.

It is only necessary to add that counsel for the curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers in the meaning of the law.

Even without this admission it is perfectly apparent that the act by its terms does not confine this pension to the children of poor persons who may in a legal sense be denominated paupers.

The class of ambitious young men and women who could avail themselves of the benefits of this act would resent such a designation and scorn this proffered aid if to obtain it they must first be classed as paupers. It is perfectly clear that the tax is not levied upon any such principle.

If it were it would collide with another fundamental principle. It would be class legislation. Says Judge COOLEY in his work on taxation, page 221:

"To justify taxation for the purpose of education the rules under which the people shall be admitted to the privileges given must not be invidious and partial, but must place all parties upon a plane of practical equality. The rule is substantially the same here that applies in the apportionment of taxation; equality must be the aim of the law, and it must be assumed that the State has no special favors to bestow upon privileged classes. It will not be competent to single out some one class of the community and exclude them from the benefits of the public schools on arbitrary grounds."

Our conclusion is that this tax is levied for a purely private purpose, and, for that reason, it is in contravention of the constitution of Missouri.

This tax is assailed in another vital point. Relators assert it is

void for want of uniformity. John C. Conley, one of the testators, died on the 6th day of December, 1896. His will was probated February 18, 1896. Susan E. Spears, the other testator, died June 10, 1896. It is essential that we determine whether the Act of 1895 or that of 1897 governs. Is the tax to be levied under the Act of 1895, if valid, or the Act of 1897, which was enacted long after the death of both of these testators?

There is nothing in the Act of 1897 which gives it a retrospective operation, and if there was, it would be in direct conflict with the Constitution of Missouri which prohibits retrospective legislation.

We think it must be plain that the Act of 1895, adopted prior to the death of these testators, if valid, must control and not the Act of 1897, enacted after their deaths. This, we take it, is the usual construction. By the terms of each, the devolution of the property and the right of the State to tax accrues immediately upon the death of the testators *In re* Seaman's Estate, 41 N. E. Rep, 401; *In re* Embury, 45 N. Y. S., 821; *Re* Estate Roosevelt, 25 L. R. A., 695; Const. of Mo., Art. 2, Sec. 15; Lecte vs. Bank, 42 S. W. Rep., 1074.

Looking to the Act of April 1st, 1895 (Laws of Mo., 1895, p. 278), for authority for this tax, we are met with the objection that this tax is also void, because the said act is in violation of Section 3 of Article 10 of the constitution of Missouri, and of the 14th Amendment of the United States, and Section 4 of Article 10 of the constitution of Missouri.

Of these in their inverse order. As already remarked, no doubt longer exists that it is competent for the Legislature to levy a tax upon the succession of estates. It is quite universally held that such a tax is not a tax upon property in the ordinary sense, but is in the nature of an excise, or bonus, exacted by the State upon the privilege or right to inherit or succeed to an estate.

It is not necessary at this time to enter upon an examination of the extent of this right on the part of the State, nor to approve or disapprove the extreme views expressed by some of the courts. While conceding the right to tax, our duty now is to ascertain, if we can, what was the purpose of the Legislature in enacting this law.

A primary and safe rule of interpretation of a statute is to endeavor to gather the legislative intent from the words they used. Gardner v. Collins, 2 Peters U. S., 93; Brewer v. Blougher, 14 Pet. 178. The General Assembly has declared that it intended to levy "a collateral succession tax," and we all agree that by whatever

name this exaction may be called, it is referable to the *taxing* power of the State.

The controlling question is, upon what did it authorize that tax to be levied, upon the property or estate of the deceased person, or upon the right or privilege of his beneficiaries to receive his estate by inheritance or devise?

If upon the latter, it is settled by the great weight of authority that it does not fall within the regular ordinary taxation upon property which our constitution requires shall be in proportion to its value. Recurring, then, to the language of the act we find that the ordinary machinery, so to speak, was not prepared for enforcing the Act of 1895, as for enforcing other delinquent taxes. It ordained that a tax of five dollars for each and every hundred dollars of the clear market value of such property where the money or property exceeds ten thousand dollars or less in value, and where the money or property affected exceeds ten thousand dollars in value, the same shall be subject to a tax of five dollars for each and every one hundred dollars of the clear market value thereof up to and including ten thousand dollars in value and a tax of seven and one-half dollars in addition for every such one hundred dollars in value in excess of ten thousand dollars, and gave a *first lien upon the property affected*, but provided no method of valuation.

The mode of procedure was amended in 1897 by providing a means of ascertaining the value of such estates which had been overlooked in the Act of 1895, and a new section to be known as section 1*a*, which provides that it shall be the duty of the Judge of the Probate Court in this State, whenever the inventory and appraisement *of any estate is filed*, which is subject to the payment of a collateral succession tax, to immediately levy upon and charge *such estate with the amount of such* collateral succession tax, and require the executor, administrator or beneficiary to pay the same, &c.

A "succession tax" as the words indicate, and the history of such taxes clearly establishes, is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another under the regulation of the State. Wherever properly laid this is its distinguishing feature in contradistinction from a property tax. The language of these two Acts of 1895 and 1897 is very much involved, and more or less doubt must be felt in interpreting the meaning of the Legislature, and this is true of other acts in other States.

When it is clear that the tax is upon the succession, it is com-

puted, not on the aggregate valuation of the whole estate of the decedent considered as the unit for taxation, but on the value of the separate interests into which it is divided by the will or by the statute laws of the State and is a charge against each share or interest according to its value and against the person entitled thereto. That is to say, it is a burden on each person claiming succession measured by the value of his interests and collectible out of his interest only. Accordingly, in New York, after whose statute the act in question seems to have been in several respects patterned, great difficulty was experienced in construing the law, but having sustained the act as levying a succession tax it was ruled in the matter of Hoffman's Estate, that when the will created contingent estates the executors could not pay the tax until the expectancies became fixed and actual; in other words, being a tax upon the person receiving the share of the estate, it did not accrue until that person was finally ascertained and that the State could only get its taxes when the legatees or devisees obtained their property. Hoffman's Est., 143 N. Y., 327.

And in the Matter of Roosevelt, 143 N. Y., 120, in answer to the contention of counsel for the State, that, while it might be considered a hardship to compel annuitants to pay a tax upon an interest that they might never receive, it was the fault of the statute, and the tax could only be postponed by giving bond, the Court of Appeals answered: "This contention admits away the entire case of the State. It is not to be assumed that the Legislature intended to compel the citizen to pay a tax upon an interest he may never receive." Until the vesting of the estate, "the power to tax does not exist."

It is obvious that the tax is upon the transfer by will or devolution by inheritance, and, in the absence of a transfer and a transferee, there is no basis for a succession tax in its true sense, as it comes to us in the history of jurisprudence and of nations.

With these essential characteristics in view, can the Acts of 1895 and 1897 be said to have levied a *succession tax?*

Section *1a* requires the tax to be levied upon the appraised value *of the whole estate left by the deceased.* The tax is at once levied upon that estate, and the personal representatives of the deceased, not the devisees and legatees, are required to pay the tax. How such a tax differs from general taxes upon the property of the deceased under our system we are not able to state. The mere calling of such a tax a succession tax does not make it different from an ordi-

nary tax upon property when the effect and operation are identical with an ordinary property tax.

This tax is collectible out of all property devised by will or descending to any person other than the father, mother, husband, wife or direct lineal descendent, whether the estate of the ancestor, devisor or grantor is solvent or insolvent. If insolvent, there is nothing to which the heir or devisee or legatee can succeed, and yet upon the theory of a succession an onerous tax is added to the charges against an estate and payable in advance of other claims.

The language of the Supreme Court of Wisconsin in State *ex rel.* v. Mann, 45 N. W. Rep., 526, seems exceedingly appropriate upon this point: "A succession tax would necessarily be imposed upon the respective parties thus succeeding to such residue. But the tax in question is not upon such succession, *but upon the whole estate* at its appraised valuation, regardless of whether it is solvent or insolvent. In case of an insolvent estate nothing would be left after the payment of debts for transmission, and in most estates there is likely to be sufficient debts to reduce the amount of transmission far below the amount of such valuation. Besides, the amount of such tax is graduated by the amount of such appraisal and is to be paid by the executors or administrators before or at the time of filing such appraisal, notwithstanding they may only be interested as such officials and never succeed to any of such estate. Manifestly the burden imposed is not a succession tax, but a tax upon the whole estate regardless of whether it is solvent or insolvent."

The New York Act (Laws 1896, Ch. 908, Sect. 225), provides for a refunding of a proportionate part of the tax in case debts are allowed after its payment and it was owing largely to this provision that that act was sustained, but no such provision is found in our Acts of 1895 and 1897. *In re* Westurn's Est., 46 N. E., 315.

We think the language of this act, whatever conjecture we may indulge as to the intention of its author, imposes a tax directly upon the property of the decedent and not upon those who may succeed to his estate, and it must be conceded that if it is a property tax it is unconstitutional because it subjects this estate to an additional property tax to that levied upon all other like property in the State for the same year, and is not levied in proportion to its value. But in no event can the Act of 1895, which governs these two cases, be upheld, because the tax authorized by it is not uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Section 3, Art. 10, Const. of Mo.

The class of subjects to be taxed under this act is the succession or inheritance of property by collateral kindred or devisees other than those named in the statute as exempt from its imposition. It is not necessary to determine what would or would not be proper classification under this act in all cases, but it is perfectly clear that when the tax is levied upon the property as under this act, uniformity is only attainable by levying the same per cent. upon all property belonging to persons bearing the same relation to the decedent. A law which levies five per cent. upon one cousin or uncle whose legacy is $10,000, and five per cent. upon the first $10,000 of a legacy of $20,000, bequeathed to another cousin of the same degree, and twelve and one-half per cent. upon the remaining $10,000 thereof, violates the constitutional principle of uniformity. It is an arbitrary classification without rhyme or reason. Such was the decision of the Supreme Court of Ohio in *State ex rel. Schwartz* v. *Ferris*, 53 Ohio St., 314; 30 L. R. A., 218, upon a provision of the constitution of that State substantially like Section 3, Article 10, of the Constitution of Missouri.

It is a significant fact that in New York, Maine, Maryland, Virginia, Pennsylvania and Massachusetts, in which inheritance taxes are sustained, the statutes only authorize a uniform rate of taxation. The constitutional guarantee of uniformity upon the same class of subjects would avail but little if the Legislature can arbitrarily vary the classes as often as the amount of property devised or transmitted by inheritance shall differ. If such a rule obtain, the classes will be innumerable, and the constitution a dead letter. Where the amount of property received is made the basis of the tax, uniformity can only be attained by levying the same per cent. upon the property of each beneficiary under the will or by inheritance.

While the legislature might perhaps distribute the collaterals according to the different degrees of kinship to the decedent or testator or grantor, and levy a different rate upon the different degrees, yet when it ignores all such natural classification and makes the amount of money received by each the test of classification it runs counter to another principle that is well nigh universally accepted that a uniform rate of taxation upon every man's property secures equality of burden. To levy a different rate simply because the amount of each man's holdings is different would produce favoritism and destroy that principle of equality before the law which is the boast of free government. If it be urged that the one receiving

the larger bounty enjoys a greater privilege, still the principle of uniformity answers that the value of his right to receive is in direct proportion to the value of the property to which he succeeds, and must, if taxation is to be uniform, be taxed in that proportion or according to one common rate.

In *State* v. *Hamlin*, 25 L. R. A., 632, the Supreme Court of Maine, in upholding a tax consisting of a uniform per cent., said: "The Constitutional requirement of uniformity is satisfied by a tax on the transmission of property by will or descent to strangers and collaterals *when it is uniform as to the entire class affected*, although other classes of persons are exempted from the tax." See also, *R. R. Tax Cases*, 13 Fed. Rep., 722.

SHERWOOD, BURGESS, ROBINSON and BRACE, JJ., concur; WILLIAMS and MARSHALL, JJ., having been of counsel, take no part in the decision of the case.

JAS. B. GANTT,
C. J.